HINTS ON
MODERN ADVOCACY
AND CROSS-EXAMINATION

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AND CROSS-EXAMINATION

BY

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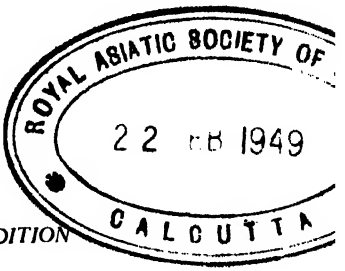

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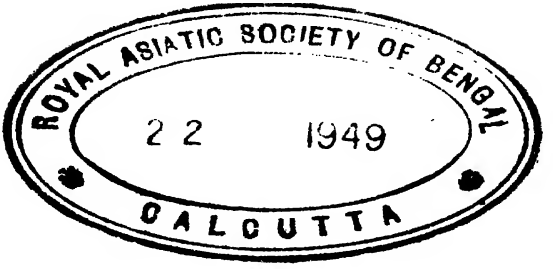

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PREFACE TO THE SECOND EDITION.

The generous reception accorded to the first edition far exceeded the author's anticipations and justifies the conclusion that the book was appreciated by those for whom it was intended. The publication of the second edition had however to be postponed on account of want of time and I owe an apology for this long delay. The book has now been re-written and considerably enlarged and many new topics have been added. The incorporation of new matters has swelled the number of pages by about two hundred. It is hoped that the book in its present form will be found to contain all the rules which should guide the advocate in the preparation of cases, in the examination of witnesses, in the argument of question of fact and law, and in matters relating to professional ethics and etiquette.

S. C. SARKAR.

Calcutta,
May, 1931.

PREFACE TO THE FIRST EDITION.

This is an age of books and I am not without hesitation when I add another to their number. I have long felt that there is need for a book on Advocacy for the practitioners in India—a book dealing with the practical side of an advocate's work in and out of Court, etiquettes and ethics of the profession, rules of practice both written and unwritten and many other things which persons choosing the profession of Law should be equipped with. A good deal has no doubt to be acquired by

experience and practice but practice without a previous knowledge of the rules of the art of advocacy does not enable a man to plead the cause of his client in a manner worthy of his profession. The best materials may be lost by unskilful handling, whereas a very plausible theory may be constructed out of meagre materials. Tact and judgment may evolve harmony out of chaos. There are dangers and pitfalls every where, there are "dos" and "don'ts" and nothing can protect the advocate better in his thorny path than a study of the rules which have been formulated and accepted by eminent advocates as safe guides from time immemorial.

There are some well known and widely used books on the subject by English and American authors, but all that is contained in them do not apply in extenso to conditions here, nor are they easily available to the numerous lawyers in India. The present work aims at supplying this want, but conscious as I am of my shortcomings, I do not pretend to have achieved all that I desired. The interest I have always felt in the subject and its importance are my justification for undertaking the task, and I submit the book to the charitable judgment of the readers. Although circumstances have for the time diverted my pursuit of law in another sphere of work, my interest in the fascinating profession of law is still the same . The votaries of law are many and if what has been attempted in these pages afford any help or instruction or encouragement to a few among them, my labours will not have been in vain.

There are many things relating to practice, method, professional etiquette &c., &c., which every advocate has to learn from his own experience and sometimes to his cost, and I think it a distinct advantage to be told of them

at the beginning of his career at the Bar. A study of the art of advocacy is a source of inspiration to many. The ideals and aspirations of the Bar enthuse the imagination of those who adopt the honourable calling and strengthen the tie of the learned brotherhood.

The work of the author which brings him into daily contact with lawyers of all grades has given him the opportunity to study their requirements, and I hope that the book will be of some use at least, to those for whom it is intended. The book is principally addressed to the junior members of the profession, but I venture to think that men of experience also will find much that is of interest to them. The advocate's work is intimately connected with that of the Judge, and the latter too will find in the book many things that concern him. The requirements of the criminal lawyers have also been specially attended to and separate chapters been devoted to the trial of criminal cases, defence of prisoners &c., &c.

The examination of witnesses is one of the most important duties of an advocate and none so more difficult than cross-examination. This subject has been canvassed in a separate portion of the book and the provisions of the Indian Evidence Act have been prominently kept in view.

In the last chapter will be found a résumé of some important rules of evidence with necessary explanations and it is hoped that they would prove very useful for quick reference.

S. C. SARKAR.

Calcutta,
June, 1926.

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HINTS ON
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CHAPTER I.

ADVOCACY AND THE PROFESSION.

The word advocate is derived from *advocare,* to summon to one's assistance. Secondarily, it was applied to one called in to assist a party in the conduct of a suit. Hence, a pleader, which is its present signification. (Bouvier's Law Dictionary).

Advocacy has for its play a wide range of subjects and it is not also confined to any particular sphere. It may be found in the speech of a Director at a Company meeting or of a politician addressing his constituency or in the private conversation of individuals. An advocate is one who pleads for another or a cause, and the object of advocacy is to press upon the audience a certain matter so cleverly and pursuasively that his point of view may ultimately be adopted. It is the art of pursuading others to accept a certain point of view by reasoning conveyed through an attractive speech. Gift of speech enables a man to bring another round to his point of view and

eloquence is undoubtedly a great asset in advocacy. But eloquence alone cannot make a man a successful advocate. Vapid oratory without a mastery of the facts and logical presentation, creates no impression. Commonsense is an invaluable asset in every occupation and the possession of a strong dose of common sense makes for the deficiency in other qualities. The advocate must also possess a deep knowledge of human character and passions.

It is said that poets are born and not made. Not so with advocates. It is true that a man born with transcendental genius will shine in every profession that he may adopt and some of the greatest advocates were brought to being with exalted intellectual powers. But strong common sense, a close study of human nature, a habit of logical thought, acquisition of a knowledge of law, experience and lastly patience, certainly bring many aspirants to fame to the forefront of the legal profession. Eloquence is undoubtedly an indispensable quality, but men not endowed with the rare virtue of gift of speech can certainly make themselves fairly eloquent speakers by cultivation of the art of public speaking and a diligent study of the great masters. Eloquence at the Bar is not the same thing as eloquence on the public platform. A clear statement of the facts in a methodical and pursuasive manner with an earnestness which at once arrests the attention of the Judge or the Jury, is more effective than flippant oratory. In fact, attempts to create an impression by oratorical flights are out of place in a court of law. There have been many successful advocates who have not been orators as the term is ordinarily understood.

Every profession in the world has its *technique* and the advocate must also learn the *technique* of his profession.

It is idle to think that gift of speech without knowledge of law, a mastery of facts and other equipments can make a good advocate. He must amongst other things have a sound knowledge of the principles of law and also a knowledge of their practical application. He must try his utmost to cultivate what is known as legal instinct. It is easier to get oneself acquainted with case-law than to have a grounding in the principles of law. This latter knowledge can be acquired only by a careful study of the principles which are the foundations of law. Jurisprudence, as Burke has said, is "the collected reason of ages, combining the principles of original justice with the infinite variety of human concerns."

A successful advocate must be a voracious reader, at least at the beginning of his career and an indefatiguable worker. Lord Eldon said that in order to become a great lawyer one should "live like a hermit and work like a horse." The subject of law covers a vast field and the advocate must try to master the general principles of every branch of law. Without this knowledge he will not be able to strike upon the particular points which may be necessary to deal effectively with an individual case. It is a mistake to suppose, as some people are sometimes heard to say, that previous study is not necessary as the number of Digests and Reports or text books now a days being numerous, the necessary knowledge can be gathered at the moment when a particular point crops up. Such books cannot be usefully consulted, and appropriate references cannot be found out, unless good use has been made of them by previous study. Further, unless the advocate has a thorough grasp of the leading principles of the law on the particular point, references in text

books or digests are likely to mislead him and he may stumble upon cases which really go against his contention.

The advocate has to deal mainly with human nature and the acts of men. A man with a deep knowledge of human nature is bound to turn out a successful advocate whatever his calling in life may be. Common sense is another virtue which is a passport to success in every profession. The greater the common sense, the greater the chance of success at the Bar. There may be an element of chance or what is commonly known as luck and opportunities may occur in a man's life which when taken at the tide will make him famous. But I should think that a man who has not equipped himself with the ingredients that are necessary to bring success in a profession, will not always be able to take full advantage of the opportunities when they come to him. Lord Sinha was asked often and often what it was that made for success at the Bar and he could only answer,—"I don't know." He says: "I always come back to my first answer that it is difficult to know what it is that ensures success at the Bar. There is a good deal of chance in it—a good deal of what we call luck, but I should be sorry to think that success is purely accidental, and that the Bar is, like marriage, a big lottery."

The subject matter of litigation being of infinite variety, an advocate should try to have knowledge of every branch of learning. A very good knowledge of law only will not enable one to win laurels at the Bar. Nothing is more helpful in the profession than general culture. Interesting knowledge on a variety of subjects can be gathered by regular reading of news papers and

periodicals of different kinds. The latest scientific discoveries and achievements can be learnt by such reading. Scientific and technical knowledge is of great use. Many cases cannot be properly dealt with and witnesses cannot be cross-examined without a knowledge of medical jurisprudence, physiology, criminology, political economy, principles of engineering, book-keeping, electoral laws, rules of meeting, mercantile usages, finger impressions, handwriting, and a host of other things. In short a successful advocate should be a man of wide culture and study. Mr. K. D. Stalland in an article in the Minnesotu Law Review, Vol., 14, p. 44, writes: "The work is intensely interesting; no two days are ever the same; the active lawyer is constantly having new experiences. He is daily acquiring new knowledge about a great variety of things. During the average week he probably learns why stucco cracks; how bricks are made; what the ingredients of a certain chemical compound are; what the cause of John Doe's insanity was; what may be the ultimate results of a certain disease; what started John somebody on a career of crime; what the history of a certain well-known business enterprise has been; the real inside story of how Joe Jackson actually made his money; what a really noble character so and so is; and what a detestable crook the sweet-smiling someone else is; what is actually the book value of the common stock in the Whoozis Company; and on top of this he probably hears the confidential outpourings of a story of actual fact that would make many a book of fiction look decidedly anemic."

In order that he may plead successfully, the advocate must have a thorough grasp of the facts of his case and

this can be acquired only by a diligent study of the cause he undertakes. These facts are to be gathered from the statement of the client's case, the evidence at the trial and the surrounding circumstances. They are the foundations of his argument. He draws his inferences or conclusions from them and builds his own theory on them. If the contest is fought solely upon questions of fact, he cannot expect to put his client's case in the best light unless he is a master of them. If it is a question of law, he must get at the principles of law which support his point of view.

It is not enough to cram the brain with the evidence and the facts of the case. The advocate must crystallize them by thought and chalk out a plan for presenting them in the best possible manner. A mass of undigested materials will confuse him and he is sure to falter at every step and bungle if they are not assorted and arrayed before hand. Lucidity of expression follows lucidity of thought. Unless the mass of materials are properly investigated and arranged, the address is bound to be incoherent and unimpressive. He must eliminate the strong points from the weak, sift the truth from the untruth and unfold his arguments clearly and logically. Facts or circumstances that shed real light on the matter in controversy can only be found out by close investigation and when the irresistible points are discovered, they should be utilised to their fullest extent by skilful arrangement. The manner of presentation of the facts is no less important than the knowledge of facts. The faculty of presenting a case in the best form is one of the secrets of success in advocacy and it can only be acquired by perseverence and experience.

Great courage, independence and presence of mind

are essentially necessary to make a successful advocate. A timid person will never shine at the Bar or win the confidence of the client and the Judge. Witnesses have broken down, unexpected difficulties have cropped up, things look black from every quarter—and yet the advocate has to keep his head cool and rehabilitate himself and regain the lost ground by coping with such extraordinary situations. The tide has to be turned back by devising a remedy from the resources of the moment. Mr. W. R. Riddle in an address before the American Bar Association spoke of courage thus: "This courage is not the courage of a prize-fighter, nor of the bully, but is the courage that will tackle every problem or question presented; investigate it; find out the whys and wherefores, the ins and outs, the pleasing features as well as those that are disagreeable, and then stand by your guns. Cowardice is only the result of ignorance, as Emerson says.

"The lawyer who is armed with the facts, with all their bearings, and who is capable of applying the law to the satisfaction of his judgment, is thrice armed with a weapon that his adversary will fear."

"Our doubts are traitors, and make us lose
The good we oft might win by fearing to attempt."

"The great defect with too many who join the profession is that they are indolent and indifferent in their investigation, not only as to the facts, but as to the law. Many of them like to lean on older or more capable lawyers. Many like to succeed through the flattery of the Judge or suavity which is better expressed by the term blarneying, or by eloquence. But where one succeeds through such methods, hundreds fail. For true success

at the bar can only be attained by satisfactory knowledge of the facts and the law" (quoted in Aiyar's Professional Ethics, pp. 139-140).

Every man has his own style of speaking. While it is an advantage to improve the style by reading and re-reading the speeches of orators of immortal fame, an attempt to create an impression by indulging in bombast and high-flown rhetoric cannot but excite derision. Slavish imitation of the style of others does more harm than good. What is required is that he should improve his own style by acquiring a knowledge of the fundamentals of the art of speaking. Moderation in speech and a temperate style coupled with earnestness are bound to create more impression than a long rodomontade. A mild and persuasive eloquence is eminently superior to a rhetorical harangue in a court of law. Beauty of language or diction has always its attractions but the style of speech must be suited to the occasion. A long winded speech often falls flat and in most cases the most impressive speech is made with the fewest of words. Advocates are employed by litigants not for exhibition of their powers of oratory but for pursuading the judge or the jury that their cause is just. Affectation or declamation should always be avoided. Earnestness and frankness coupled with determination, go straight to the mind and make the points stronger than they really are. A thorough study of the cause which he has undertaken and reflection over it, inspire confidence in the advocate and if he prepares himself with the vast materials at his disposal, an impressive speech is bound to follow. As Cicero has said "Diligence is capable of effecting almost everything."

As to eloquence at the bar, Lord Birkenhead, who

was one of the best speakers of his party, has said: "The art of advocacy is not confined to any particular topic, still less to any particular sphere. Eloquence may be found round a dinner table, or in a library just as, if more amply exerted it may dominate a vast assembly in the Albert Hall. The connection between eloquence and advocacy is apparent. Eloquence is the gift of speech which more than any other equips the advocate to achieve his primary purpose, namely to pursuade. What then is eloquence? Here we approach a question which has been discussed by the most subtle brains in ancient and modern civilisation. In a general definition I should describe it as the faculty of presenting a point of view, whether argumentative or emotional, in such language and in such gifts of articulate expression as to produce a great persuasive effect upon the minds of the audience, whatever that audience may be. Evidently, then a great advocate will almost always be eloquent in the sense in which I have attempted to define eloquence. But there have nevertheless been very considerable advocates, especially in the field of law, who have not been eloquent in the ordinary sense. Such a man was the late Lord Justice Holler, at one time a most formidable advocate at the bar, and equal rival of the late Lord Russel or Killowan. He substituted for the gift of speech a stocky and imperturbable personality ; a quality of homely humour ; and an immense familiarity with the facts of the particular case which engaged his faculties at the moment."

Sir John Simon is now one of the foremost advocates in England. His rise at the Bar has been very rapid and it is said that while he was 42 he was offered the Woolsack but he preferred to stick on to the profession for which he

has so much fascination and to pursue his political career. He was invited by the American Bar Association in 1921 and in the course of his address he said: "I have been insisting that in the outfit of the advocate, the two things that are most important are, first, the ability and the willingness to work so as to accumulate all the materials available; and secondly, the judgment and the character which will winnow out of those materials and select what is really necessary for the purpose in hand. One of the most important things at which every advocate ought to aim is this economy of his material which enables him to present a picture in which everything that is critical and salient stands out and where there is no danger that anybody will fail to see the wood for the trees." As to oratory at the Bar, he said: "I cannot bring myself to believe that highly rhetorical periods really ever have had either on judges or juries all the influence which historians and biographers assure us they did have in the case of the particular subject of their admiration."

Lord Birkenhead who had an unique position in the Bar rapidly rose to fame and commanded an extensive practice. Mr. Smith as he then was, appeared in many *causes celebres*. He became Lord Chancellor of England in the year 1919 at the age of 45. He can speak with authority on the subject. In a recent article in the Strand Magazine, which has been quoted before, he summarises the equipments of an advocate thus:

"(1) He who would persuade others should (if it is by any means possible) believe in the cause he pleads.

(2) In legal matters this counsel of perfection is not always attainable, therefore he must do his best without it.

(3) Before he begins to speak, he must completely understand his thesis and the order and logic of his presentation.

(4) He must present it with every gift of rhetorical art which his education and cultivation have equipped him. Sympathy, humanity, irony, invective, emotion; all will contribute congruously to the evolution of the technique of the perfect orator. Such a one can easily be conceived of one who has inherited great natural gifts; such a one will not do justice to those gifts unless he reinforces them by intense study of the facts of every problem which he examines and unless he has lent them quality by a close and zealous study of the masters of the classical and English advocacy as expressed both in written and in spoken eloquence.

"And one other of practical advice may be added, I have laid stress upon the importance of careful preparation. To beginners this advice is of the first importance. But of course it must be realised that men are often called upon to make important speeches in circumstances which render elaborate preparation impossible. The art of spontaneous debate throws a speaker upon the resources of the moment. How far he succeeds will depend upon the readiness of his tongue and wit; but even more upon the value and substance of that which is stored in his mind. Whilst therefore, I advise youngmen to think out beforehand all their important speeches, I counsel them equally never to neglect upon occasions less critical, the practice of extempore speech. The art must be acquired, and can be acquired of thinking aloud with as little embarassment and little confusion as one thinks to himself."

The legal profession is one of the oldest and most honourable in the world. The Roman advocates were held in much esteem in the ancient times. In Greece too the advocates enjoyed an exalted position. The *Sukraniti* of the Indians (Ch. iv, 5, S. 108) lays down that in some cases a litigant had a right to be represented by a paid advocate, *i.e.*, when he was unacquainted with legal practice or was overburdened with other work. The remuneration to be paid to the advocate, or *neogyi* as he was called, appears to have been fixed on a graduated scale varying from 1/16th (or 6¼ per cent.) to ⅝ths per cent of the value of the matter in litigation. The receipt of a larger remuneration was punishable. Only qualified persons could act as advocates, and corrupt practice on the part of the *neogyis* was punished (Professional Ethics, p. 5). In France, advocacy was considered a very noble profession and they were known as *"noblesse de la role,"* "Pleaders or advocates existed in England in very early times, as early as the reign of William Rufus. There is perhaps no country in the world where the conduct of advocates has been so little the subject of legislative interference as in England. The same is practically the case in America" (Prof. Ethics, p. 24).

There is no royal road to fame in advocacy, no short cut to make. Eminence in the profession is the result of long uphill work. The early years are a period of hard struggle against tremendous odds. There are moments of extreme depression and it is strength of character, super-abundance of confidence in one's self and untiring patience that lead to the promised land. Always look upward and wait for opportunities. When you choose the profession, do it with the full understanding that it will involve a

long period of waiting. The greatest advocates of the world have fought their way in this manner. In the hard and trying days and years when their high abilities were being forged in the fires of daily trial, they worked away in silence and obscurity. It is said that in the early days of his struggle Viscount Haldane, who became Lord Chancellor of England, seriously thought of coming to Singapore in pursuit of fortune. Sir John Simon was glad to supplement his income by tutoring one of the sons of the King of Siam ; Viscount Hailsham late Lord Chancellor, took the precaution of getting experience in the City before he came to the Bar ; Lord Reading (as Mr. Rufus Issacs) tried various occupations before he settled at the Bar ; Lord Merrivale, the President of the Divorce Division, was a press-reporter at Plymouth when the encouragement of Sir Edward Clarke sped him on his legal careeer ; Lord Hewart was a working journalist during his early years at the Bar. The late Sir Samuel Evans struggled for years, with seeming ill-success, but which his chance came he was accepted as one of the most distinguished judges of his generation. Walsh says in his "Advocate" : "Face it boldly. Patience and perseverence will have their reward. Many of our biggest men were on the point of giving up when work began to come. One brilliant High Court Judge made 30 guineas in his first seven years." A brisk practice from the beginning of career has come to the lot of only a few men at the bar. Instances may be told of numerous famous advocates who rose to the top of the ladder after many years of intense despair which at times led them to think seriously of adopting some other profession. Steadfast devotion, a faint ray of hope at times—induced

them to stick on. The key to success is work, work patient work in the midst of starvation and despair. Lord Chancellor Viscount Cave in his 70th year said: "Now a day I confine myself to ten or twelve hours' work a day. To-day, when I am in my seventieth year, I keep 'pegging away,' and I think that I am all the better for it. The fact is that there is no fixed 'line' to be drawn between duty to work and duty to health. It all depends on the individual; and to many people work brings health and *is life.*"

But when the storm is braved and the height is reached, what a golden harvest it brings! No liberal profession in the world can bring such fabulous wealth as the Bar. Sir Henry Hawkins, afterwards Baron Brampton, was the most distinguished advocate of his time. He appeared in the celebrated Tichborne trial which is the longest trial in the annals of *causes celibre*. He is said to have earned more money at the bar than any one else. He says in his "Reminiscences": "Solicitors no longer condescended to deliver their briefs, but competed for my services. I say this without the smallest vanity, and only because it was the fact, and a great fact in my life. . . . . Lloyd must have made £20,000 a year with the greatest ease; what I made is of no consequence." "One brief was delivered with a fee marked twenty thousand guineas, which I declined. It would not in any way have answered my purpose to accept it. I was asked, however, to name my own fee with the assurance that whatever I named would be forthcoming. I said I would consider a fee of fifty thousand guineas, and I did so; but resolved not to accept the brief on any terms, as it involved my going to India, and I felt it would be unwise to do so. What

my income was at the Bar is of no interest to any one ; suffice it to say that no expectations of mine came up to its amount, and even now when I look back it seems absolutely fabulous. I will say no more, notwithstanding the curiosity it has excited amongst the members of the profession."

When Sir John Simon took leave of the Bar for presiding over the Indian Statutory Commission, he is said to have enjoyed an income of £60,000 per annum. Among advocates here, S. P. Sinha (afterwards Lord Sinha) is said to have earned more money than any other member of the profession. Equally large was the income of Pandit Motilal Nehru who is said to have made the princely income of Rs. 3,00,000 to 4,00,000 a year. Ten years before his death he sacrificed this income and withdrew from the profession in pursuance of the policy of 'non-co-operation.' Very great was also the income of C. R. Dass, who too made a similar sacrifice. Both of them won greater fame in the field of politics and fought till their death for India's liberation.

Lord Sinha too had his days of depression and anxious waiting. In a recent newspaper article entitled "My first brief" he says of himself: "When I began I had not got any University degree ; I had not passed the final examination for the Bar, easy as it was, I had never been inside the chambers of any practising barrister or solicitor for practical training and therefore knew nothing of the practical application of law, I had never been a member of nor taken part in any debate in any debating society either in India or in England. It is difficult therefore to conceive of a man starting his career at the Bar with more inadequate equipment than I did. And now when I come

to look back these many many years and consider the rashness of a man so ill prepared, starting life at a place where he did not know a single judge or barrister or solicitor, where he and his family were totally unknown, at any rate unknown to persons who matter so far as the business of barrister was concerned—I can only wonder at his audacity. . . . . Things did not look cheerful when I stepped into the Bar Library in November 1886. The Calcutta Bar was then the most crowded Bar in India and there were giants. But there was besides a large number of unemployed juniors mostly Indian, who had been trudging to and fro between their homes and the Bar Library but had not succeeded in making any impression. These latter were the men with whom I came most in contact and they all impressed on me that here there was little chance for a friendless stranger like me. The prospect as I said was desperately cheerless ; but there was nothing else to do, for, I did not know anything else which I could do. And thus began the cheerless and almost hopeless, waiting at the Bar Library in the company of more than a hundred equally hopeless members of the learned brotherhood." In the same article he describes the terror and nervousness he felt and how he made a muff of his first case which was however an *ex parte* one. A young articled clerk in an attorney's office named Jadav Chandra Chakravarty who had been in the same class with him in the Presidency College and who afterwards became one of the cleverest attorneys but died young, came to him and offered a brief. Lord Sinha says: "He came to me one day afternoon with an undefended brief marked with the usual fee of two gold mohurs (34 rupees) and what was unusual—34

rupees in cash. In those days it was almost unknown for an attorney to send such a brief with cash to a junior, who generally would have to wait till the next Pooja vacation to get his fees, if he got them at all. So the brief to me was doubly welcome, welcome not merely because it would give me the chance of opening my lips in Court but also because of the cash which accompanied and which was sorely wanted. Do you think I was elated? Do you think I was burning with desire to make an eloquent speech? Nothing of the kind. It was stark naked fear that took hold of me—fear that I would not be able to get the decree which the attorney wanted—fear that unfamiliar as I was with practice and procedure and the art of speaking in Court, I was about to damn my whole future for the sake of 34 rupees badly though I wanted them. Anyhow I went home that evening happy with my first fruits but at the same time in mortal dread of the morning of Monday when I should have to appear in Court. Monday came and I was in my place in Court at the Bar with my small brief, every line of it marked in blue and in red and every word of it burnt into my memory in letters of fire. How different this from the days when my attorney's one anxiety was to make certain that I had untied the red tape of my brief before I actually appeared in Court for the case! The Judge was Mr. Justice Trevelyan—himself a member of the Calcutta Bar not many years before—a kindly amiable soul who in his time helped many a lame dog over the stile. The case was called on in due time and I got up with my brief "ready," because I had got it by heart. "My Lord," I said, "this is a suit on a promissory note in respect of money lent in the following circumstances.

"What is the service," interrupted the Judge. I had not the least idea of what his Lordship meant and so I went on to finish the sentence I had begun, trying to relate when, how and in what circumstances the money had been lent. But the Judge was not listening, for, by that time he had finished reading the affidavit of service of summons the most essential thing in an undefended case as I soon learned, and finding that it was "personal service" to which no exception could be taken, he told me as I was floundering along, "Call your witness." Again I was at a loss. I did not know what I was to do, whether I was to ask my attorney to bring his witness who might or might not be behind me or whether I was to ask the court-peon to oblige me by getting hold my witness and making him come to the box. But apparently I had nothing to do in the matter, for as I looked behind for help to the attorney who was standing behind me, the witness was already in the box. The attorney told me "Put your question." But before I could do so, the Judge himself had handed over the promissory note annexed to the plaint to the witness and asked him, "Was that signed in your presence by the defendant?" and the witness gave his answer. Before I could say anything, the Judge asked him further "What amount is now due for principal and interest?" and the witness having given his answer the Judge again took the bit between his teeth and said "Decree for rupees so much for principal and so much for interest etc." He turned to me and said "That's all Mr. Sinha," and I knew with relief that the case was over. So, that is my experience of the first case I conducted in Court, if it can be said at all with any truth that I conducted it. I left the Court thinking that I had so

conducted myself that there would be little chance of a second case for me. But apparently it was not an unusual experience because my friend the articled clerk came round to me afterwards and said "You see now how easy it is and I am sure you will feel more happy when I come to you with the next brief." But it was a long long time before the second brief came, and longer still before I felt a reasonable degree of confidence in myself."

CHAPTER II.*

THE INDIAN BAR.

The Bar in India is not without its attractions. It has made rapid strides in the past and has produced lawyers and jurists like Sir Rash Behari Ghose, Sir Bhashyam Aiyyangar and many others, who would do credit to any Bar in the world. The majority of the members of the legal profession in India consist of lawyers born, educated and trained here and they have displayed wonderful capacity for legal attainments.† The Judges of the High

* This chapter was written before the Indian Bar Councils Act was passed and became law. The object of unification of the various grades of practitioners and of having one class of legal practitioners with equal rights and privileges has not been achieved and unhealthy rivalry is very much in evidence as before. Invidious distinctions still exist between Vakil-Advocates and Barrister-Advocates and there have been conflicts followed by recriminations on more occasions than one. The discontent has possibly been accentuated and is finding expression at every opportunity. In Calcutta, the Vakil members of the Bar Council resigned in protest and there is now no Vakil member on the Council except the Government pleader. There was also the battle of the robes in Calcutta, Patna and elsewhere. A self contained Indian Bar and a Legal Council of Education for call to the Bar advocated by men like Viscount Haldane have yet to come.

† Since the publication of the first edition a pleasing tribute to the district lawyer has come from Al Carthil who was a District and Sessions Judge in India. Says he in his latest work "The Company of Cain" :—"The Indian pleader must excite the admiration of the observer. He is wonderfully fluent in very good English;

Courts drawn from the ranks of vakils have by reason of their profound learning and high integrity easily held their position while sitting with members of the English Bar. The pages of the Law Reports abound in judgments of distinguished judges like Dwarkanath Mitter, Sir Ashutosh Mookerji, Sir Muthuswami Aiyyar showing vast learning and research. The subordinate judiciary is recruited entirely from the ranks of junior members of the legal profession and they too have played their part with conspicuous ability and integrity. The late Earl of Selbourne, Lord Chancellor of England in the course of a speech in 1883, spoke of the subordinate judiciary in the following terms: "My Lords, for some years I practised in Indian cases before the Judicial Committee of the Privy Council and during those years there were few cases of any imperial importance in which I was not concerned. I had considerable opportunities of observing the manner in which, in civil cases, the native judges did their duty, and I have no hesitation in saying—and I know this was also the opinion of the Judges during that time—that the judgments of the native judges, bore most favourable comparison, as a general rule with the judgments of the English Judges. I should be sorry to say anything in disparagement of English Judges, who as a class are most anxious carefully to discharge their duty; but I repeat that I have no hesitation in saying that in every instance,

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he is well-versed in law; he is laborious, independent, tenacious of the rights of his co-operation and of his client, yet respectful to the Court, honourable and honest inspite of many temptation. I look back with immense desire to many things in India but to few with greater desire than to my familiarity with my friends at the Bar."

in respect of integrity, of learning, of knowledge, of the soundness and satisfactory character of the judgments arrived at, the native jugments were quite as good as those of the English Judges."

These achievements of the legal profession in India cannot fail to inspire generations of our young men. Men of the stamp of Sir Rash Behary Ghose or Sir Bhashyam Aiyyangar are rare in any country. But it should be remembered that they and other worthies of the profession had to fight their way against difficulties which do not exist in any other country. By a curious fiat, the original side of the High Court in Calcutta, where money is most made, and the Criminal Sessions are closed to the vakils. Sir Ashutosh Mookerji who adorned the Calcutta High Court for 20 years, in his minute on the Legal Practitioners Amendment Bill said: "A system which rendered it impossible for a Dwarkanath Mitter and a Rash Behary Ghose to take up cases on the original side, merely because they are vakils and not barristers, stands self-condemned. The incongruity of the present system becomes manifest when we remember that a vakil as soon as he is appointed a judge becomes qualified to hear cases on the original side, to determine appeals from the original side and to preside over the criminal sessions. If he resigns his seat on the Bench and reverts to the ranks of the profession, he is relegated to the status of a mere vakil with the inevitable consequence that his admission to the original side is completely barred. A vakil is competent to argue a case of the utmost complexity and involving subject matter of the highest value, provided it has been brought upon appeal from a District Court. But if a similar case has been tried on the original side, a vakil

is not competent to take charge of the matter on appeal. The more we explore the matter, the more obvious it bcomes that the present system is indefensible." There is another aspect of the matter. Every one has the right to be represented by a lawyer of his own choice. If a litigant having work in the original side considers a vakil better qualified than a barrister and has greater confidence in him, he is denied the services of the former merely because he is a vakil. It must be news to many that a vakil has a right of audience in the Privy Council and the highest tribunal in the Empire makes no distinction when lawyers of different nationalities come to argue their cases before the Board. In his evidence before the Indian Students Committee (1922) Lord Haldane said: "We have counsel of every nationality and from every part of the globe where the British Empire extends appearing before us, and they take precedence according to the precedence in their own Courts. If there is somebody who has been made a King's Counsel in, we will say, Manitoba (because even the provinces of Canada make their own King's Council), he takes precedence of a King's Council made here and leads him in the argument at the Bar. So it is with everybody. We should hear a vakil or anybody the Privy Council. According to him the present system in perfectly indefensible from all points of view. He said: "Why does he (Indian student coming to England for being called) pursue it when he is going to the Calcutta Bar, say? Because he will find that a barrister called here takes precedence of him, however distinguished his position may be as an advocate. He may be the most learned vakil possible, but he has not a look in ; he is behind in point of precedence. The reason does not rest with people here,

it rests with India, and I have never been able to understand why India has not set it right long ago."

Talent and ability are being suppressed by denial of fair competition. The artificial hall-mark is available to those only who have a long purse irrespective of fitness. Whenever any attempt it made at reform, men with vested interests raise a cry and unpleasant controversies are provoked. When Mr. S. N. Ray raised the question of establishment of a City Court in Calcutta by abolition of the dual system, a much needed reform, Mr. S. P. Sinha (afterwards Lord Sinha) tauntingly spoke of "eight anna pleaders" and was silenced by his opponent by the story of "tu'pny barristers." Not long ago Mr. B. L. Mitter (afterwards Advocate-General Bengal and Law Member Viceroy's Executive Council) when appearing in the case known as the Servant defamation case, spoke contemptuously of pleaders while attacking the credit of a pleader witness. Mr. Dasarathi Sanyal, a very distinguished vakil, who was on the other side made a dignified protest and said that if the much maligned pleader were to go to England and return as a barrister, he would be welcome as a respectable member of the Bar and would in time become one of the responsible law officers of the Crown. Reform in this direction is overdue and the sooner the question of having a single grade of practitioners is taken up, the better.

A futile attempt is made by interested persons to justify the present system of exclusion by invoking the aid of the grandiloquent phrases "traditions of the Bar" "reading in chambers" and claiming that nothing short of a stay in England, however brief it might be, can make a man appreciate the traditions of the bar. No one would

underrate the ennobling influence of the traditions of the bar of any civilised country, but to claim that such traditions grow in a particular soil is to make an impossible demand. An American would say that the traditions of the American Bar surpass all others and a patriotic Englishman would make the same claim. But an American or German would certainly consider it preposterous and intolerable if he were told that he cannot have a knowledge of or act up to the traditions of the bar if he does not get called from an English Court of Inn. The fact is that the traditions and ideals of the bar are almost the same everywhere. The path of honesty and integrity is the right path all over the globe. Who can claim a deeper knowledge of or respect for the traditions of the Bench and the Bar than Sir Gurudas Bannerji, Sir Ashutosh Mookerji, Sir Muthuswami Aiyyar, Sir Rash Behari Ghose, Sir Bhahsyam Aiyyanger, to name only a few among a host of legal luminaries? Who has upheld the best traditions of their respective professions with greater strictness and devotion than these men? It is significant that the most prominent members of the Calcutta Bar now are persons who had their training as vakils. If the original side had been thrown open to them from the beginning without putting them to the necessity of taking a journey to England, they would have reached the same eminence sooner. It is the removal of the bar by getting 'called,' that has enabled their talents to have full scope. There are many others who could have done equally well but for the artificial restriction. It is idle to say that keeping a few terms and a stay in England for two or three years can accomplish what a man has to learn in his life time. Traditions of an honourable profession cannot be learnt in chambers like copybook maxims.

They come intuitively to those who follow the path of virtue and seek inspiration from the lives of great men. Ideals of a profession kindle the imagination of those who strive for them. The traditions and ideals of a profession are the product of a course of conduct characterised by the integrity, ability and independence of its members and hallowed by the memory of ages. Every right thinking man must agree that the education and training of a lawyer must be in the country where he is to practice. India is the field of his labours and Indian conditions and Indian culture must be given the preference. It is Indian law supplemented by Indian customs and usages that has to be administered among the Indian people. Their system of jurisprudence is founded upon their civilisation, culture, social institutions and code of ethics. An English lawyer practising here has to get rid of many notions which he imbibed in his own country. The so-called plea of better system of training is wholly unfounded. It is not certainly an ideal system of training that is in existence in England. People with vested interests have so long given an exaggerated and inaccurate description of the system of legal training in England and misled us. It is not good enough for Englishmen practising in their own country ; it is worse for Indians intending to practise in India. No one can speak on the subject with greater authority than Lord Haldane. He knows better than any one else, what the Indian students really do in England. In his evidence before the Indian Students Committee (1922) he condemned very strongly the training imparted to the Indian students in England and spoke of it as a "totally wrong training." He gave his considered and definite opinion that reading in chambers in England does no good to the

Indian students who go to practise in India and that infinitely better results would be obtained if they were to read in chambers in India and be called in India. He said that it was a scandal that they should come here and eat dinners and not have the chance of doing anything else but hear lectures and wander about the Courts. In the course of his evidence he said: "It is a training which is the only one we have got for an English barrister, but it is by no means perfect, and some of us want very much to see it improved. *It is a totally wrong training, in my view for an Indian student.*" Again, says he: "*The Indian student studying in our Courts here seems to me merely to get his mind poisoned against what he might imbibe profitably if he went to India. He would do much better to read in chambers in India* and to be called in India. It would be well to get rid even of the degree of vakil if you could and have one profession with seniority in it, and make your own King's Counsel. Then you will be delivered from this very bad system of training because there are not places in barristers' chambers even for English students. The Indian student has very great difficulty in getting in. *It is as bad a system as it is possible to conceive.*" The law examinations in India are much stiffer than the Bar examination in England even after the standard has been raised there. Time was when men who could afford the costs, followed the very common advice "If your son cannot graduate or do anything here, make him a barrister." It appears from the Report of the Indian Bar Committee (1923-1924) that "between 1901-1920 no less than 1997 Indians joined the Inns of Court. The chief reasons which in the past led such numbers of Indians to go to England to be called

to the English bar appears to have been that it was considered to be much easier to pass the Bar examination in England than to qualify as a vakil of a High Court in India, and that there were distinctions between barristers and vakils in such matters as precedence, eligibility for appointments and practice on the original sides of the High Courts."

It is neither fair nor honest in the face of the irrefragable testimony above to make a fetish of traditions or training with the sole object of making a close preserve for a few. The slogan of "traditions" was repeated *ad nauseam* before the Bar Committee by interested persons in justification of the continuance of the present system and the humourous and incisive reply came from Mr. Narendrakumar Bose a distinguished vakil of the Calcutta High Court that it was "Bays-water traditions." Besides the heavy economic drain it involves and the handicap to promising but indigent persons, there are dangers in sending our young men abroad in pursuit of knowledge that can be best acquired here. Readers of contemporary events are aware how some of our young men were pursued here with actions for breach of promise or disbarred for offences committed during their stay in England. The conditions of life which many of our young men have to lead in England are to be found in the report of the Indian Students' Committee, 1922, presided over by Lord Lytton. They require immediate attention of persons who are interested in the welfare of our students.

Protestations are not the same thing as adherence to traditions. "To mark on the brief more than he is paid, or to alter the fee after the result, is of course fraudulent

conduct" (Walsh's Advocate p. 182). In a recent case the Chief Justice of the Calcutta High Court had to comment strongly on the existence of this practice which is not in accordance with the traditions of the profession. In a case two counsel wanted fees of 30 and 20 gold mohurs. It was eventually arranged that the first counsel should receive 20 gold mohurs per day and the second 12 gold mohurs. The brief was however marked 30 gold mohurs and 20 gold mohurs. The counsel signed for their fees. Sanderson, C. J. said:—"It is evident therefore that the fees appearing on the brief were not those arranged and actually paid to the learned counsel, but that the fees were marked in the manner appearing on the briefs for the purpose of taxation as between party and party and with the object of getting these fees allowed in taxation and recovering from the opposite party. . . . . It was stated by learned counsel in Court that this was a common practice adopted for the purpose of getting the fees allowed in a party and party transaction against the unsuccessful party. I desire to make it clear that such a practice cannot be recognised by the Court for a moment. In our judgment such a practice is reprehensible, and not in accordance with the traditions of the profession and we wish it to be clearly understood that it must not be repeated in the future. If it is, and if it comes to the knowledge of the Court, it may be that the Court will take a serious view of the matter. I should have thought that what I am about to say was so well known in the profession that no necessity would arise for referring to it. The actual fees, which it has been arranged to pay to counsel, must be marked on the counsel's brief, and no manipulation thereof can be permitted for the purpose

of taxation or otherwise." (*Romesh* v. *Jadab*, 28 C.W.N. 497).

The time has come for the creation of a self contained bar in India and to have one legal profession. Devise any system of training that is considered best, make the test as stiff as you like but make it available for all men here and let there be fair competition. As to the creation of an Indian Bar and whether the High Court should continue to enrol advocates or it should be left to a Legal Council of Education, Lord Haldane said "Call your barristers and make your own barristers. The High Court is not an administrative body. Set up your Council for call to the Bar and a Committee to superintend legal education. Say to the student: 'You must come with a degree from the University,'—the Bar being treated as something post graduate to that. You must then show that you have studied practically with the vakil or with somebody at the Bar—just as here, and you must also show that you are qualified in the various systems of law which you know." No one desires to see the powers of the High Courts curtailed but the fact should not be lost sight of that they have failed to move with the times and to grasp the real situation. It is to be much regretted that the Calcutta High Court is to be blamed most in the matter. It appears from the minute of Sir Ashutosh Mookerji that it has in the past always opposed every attempt to remove the disabilities of the vakils although the other High Courts have showed their willingness to relax the rules to some extent. It is not therefore surprising that the people have now sought reform through the Legislature. In the same minute Sir Ashutosh Mookerji declared: "To my mind

it is clear that the change has to come—whether this will be effected by the Court itself or by the Legislature, I shall not undertake to prophesy."

The rigidity of the rule has to some extent been relaxed in Calcutta recently by permitting vakils of some years' standing to get themselves enrolled as advocates. But a half-hearted measure always creates a worse situation, and the effect of a short sighted policy is already being felt. It has not allayed discontent. The rules about the examination for making advocates, even after the passing of a difficult law examination, have been made unnecessarily stiff. It is only putting a premium on cramming, even at the last stage and ignoring practical training. It appears from the letters in the press that the vakils have refused to take the new advocates within their fold and the barristers will of course have nothing to do with them as before. There is the same jealousy as in the past, and possibly more. Yet we are aware that the legal profession is one of the most democratic professions in the world and its *espirit de corps* is one of the finest! The question of fraternity and *espirit de corps* in the Bar is intimately connected with the question of having only one grade of practitioners with seniority in it. Questioned regarding the precedence which barristers of the Inns of Court took over vakils in India, Lord Haldane said that he did not like it. Some of the vakils were very able men and were put at a disadvantage ; he would like to see people who plead in Indian Courts all barristers. In Ontario, for example, you would find a firm of barristers and solicitors ; they were probably all barristers who divided themselves into two groups. He thought that was a better system. He would place all

vakils and barristers on the same footing. There was only one real safeguard, and that was to have an *espirit de corps* among the Bar, and a high standard of honour that would search out and repress iniquities far better than any amount of technical rules.

The subject is so important and the arguments adduced by Lord Haldane are so conclusive that a portion of his evidence before the Committee is reproduced below. The arguments of Sir Ashutosh Mukerji against the continuance of the present system are equally incontrovertible and his Minute is also printed.

*Lord Haldane's evidence before the Indian Students' Committee, London, 1922, known as the Lytton Committee.**

The attention of the witness was called to the question of law students and it was pointed out that the difficulty raised by the law students was mainly as follows :—They contended that the legal education in India was very good, some thought better than in this county, but when they became qualified vakils in India they were not allowed, with but few exceptions, to practise in the High Court which were reserved for barristers. They came to this country to get called to the Bar, and after passing an examination which was less stiff than the one they had already passed in India, they went back and took precedence over their own countrymen who had remained.

On this Lord Haldane said :—

"This is a subject to which my attention has been directed for some years, and rightly or wrongly I have come to a very clear conclusion about it—clear to myself. Before you settle whether you are going in favour of an organisation or against it, you must ask yourself the purpose for which the organisation and the education which it gives exist. The purpose here is obviously to produce the best Indian lawyers you can, advocates and people

* Appeared in 38 C.L.J. 53*n*.

who can fill judicial positions. That turns *prima facie* on the training that you give them. Every system of jurisprudence has its own spirit and character, and is different from every other. There are certain foundations on which all legal training ought to rest, foundation which belongs to jurisprudence rather than to law, that is to say, to the science which is akin to ethics, but which is only parallel to ethics, which is at the foundation of all law. Our best writers nowadays on these foundational subjects came from Universities, men like Professor Dicey and Professor Pollock and Professor Maitland. The text-books here are getting to be more and more masses of digested authorities without much reference to principle, and it is getting to be more and more serious, because in the old days, when our system of law was founded entirely upon the English common law, which was a very scientific system in one way but a very unscientific system in other ways, a highly technical department of knowledge was created, in which men who trained themselves in these technicalities became masters of their craft and used to write beautifully. Now the whole field is so obscured with decisions and statutes and other details that within the purely so-called legal study of English law you can get very little. You have to turn to the foundations of jurisprudence, which are emerging more and more by very necessity, and it is the great text-writers who come from the Universities, where the atmosphere is wider than that of any particular system of jurisprudence, who are giving us what is best. The relevance of that is when you go to India what you want there, too, is the double stage. You want, first the training in jurisprudence. I have conveyed what I mean by jurisprudence as distinguished from mere law. Then you want the training in law and practice and the spirit of the Courts. The first is no doubt very much the same as that we should have in England. It is not quite the same because anybody who has been trained for the Indian law, even in its foudations in the jurisprudence which has to precede its detailed study, ought to have his mind enlarged by getting rid of a great many notions which an English lawyer has and a great many others which a Hindu lawyer, for instance, has. The difference of principle which

emerges in Indian law ought to be something of second nature to him as certain principles of western system are of second nature to us. That naturally affects to some extent the atmosphere of the school of jurisprudence in which he studies, but that school of jurisprudence, can be put up to a standard which analogously is as high as in the other case. But when you have done that, what is the next training? Here young men come from the Universities, when they have been imperfectly trained in jurisprudence because very few of them have as much as they should. Then they come to the Inns of Court, where they are not sufficiently instructed in these foundational things. There is some teaching in it. They learn about the rules and about the statutes and about the case law and all about what happens in an English Court of Justice, and to fill up the interstices of that extremely miscellaneous framework they go into the chambers of a practising barrister to pick up what they can pick up. It is a training which is the only one we have for an English barrister, but it is by no means perfect, and some of us want very much to see it improved. It is a totally wrong training, in my view, for an Indian student. Why does he pursue it when he is going to the Calcutta Bar, say? Because he will find that a barrister called here takes precedence of him, however distinguished his position may be as an advocate. He may be the most learned vakil possible, but he has not a look in; he is behind in point of precedence. The reason does not rest with person here, it rests with India, and I have never been able to understand why India has not put it right long ago? India ought to call to its own Bar; it ought to call men to the position of barrister; it ought to create its own King's Counsel. If anybody says it is an innovation, my answer is that that is what the whole of the Dominions do, with the exception of that country called India. I sit daily in the Judicial Committee of the Privy Council. We have counsel of every nationality and from every part of the globe where the British Empire extends appearing before us, and they take precedence according to the precedence, in their own Courts. If there is somebody who has been made a King's Counsel in, we will say, Manitoba (because even the provinces of Canada

make their own King's Counsel) he takes precedence of King's Counsel made here and leads him in the argument at the Bar. So it is with everybody. We should hear a vakil or anybody who has been called in his own country, but when it comes to precedence we look to see who is analogous to what. I do not see why an Indian student should have to come over here to get what seems to me to be a much worse education for his future calling in life that he would get if he pursued it out in India. It is all very well, you know, but the training in an English barrister's chambers, even if you can get there, is imperfect if you are going to the Indian Bar. First of all, there is much less chance of training there than there used to be. In the old days there was a vast number of papers which were sent to counsel to settle not only deeds, but pleadings and petitions and so on, and it was fine discipline mastering the very technical and artificial rules which governed those things and drafting proper documents, even if you were going to practise in some remote region with another system. But there is not much of that now, and what there is has become more and more conventional to the English Law Courts. The Indian students studying in our Courts here seems to me merely to get his mind poisoned against what he might imbibe profitably if he went to India. It would be well to get rid even of the degree of vakil if you could and have one profession with seniority in it, and make your own King's Counsel. Then you will be delivered from this very bad system of training, which is bad because there are not places in barristers' chambers even for English students. The Indian student has very great difficulty in getting in. It is as bad a system as is possible to conceive."

In reply to questions on the matter the witness said he considered that the value of reading in chambers was very much exaggerated; he did not think it could be dispensed with because it was the only way of getting in contract with what happened everyday, but it was not an adequate way of getting into contact.

If the proposals that he made were carried out it would be a great relief to the Inns of Court, and he did not think there would be any objection or difficulty so far as the legal authorities in

this country were concerned. Indeed, he thought, they would be much pleased because they felt they were not providing adequately for the Indian students. It was a scandal that they should come here and eat dinners and not have the chance of doing anything else but hear lectures and wander about the Courts.

Asked as to a statement that it was necessary to have an element of the English Bar in India in order to raise the standard of honour and industry, the witness said he had sat for a long time on the Judicial Committee of the Privy Council and had argued in a great many Indian appeals when he was at the Bar. The more he had seen of it, the more he was impressed with the grown character of the Indian Judges. The standard of legal knowledge shown in their judgments was very high. He would like to mention that there was more of a disposition to be technical in the native judgments than there was in the white judgments. That was the result of a shorter history, but it was all working out right. He thought that the prestige and honour of the Bar in India might with perfect safety be left in charge of the High Courts in India.

It was pointed out to the witness that in order to create an Indian Bar there would have to be control in India; and conditions might be sent up in India for English barristers preparatory to their practising there. He considered that they should be admitted *ad eundem*, without any more proof that they had been in practice and proper persons; that was done every where else in the Empire.

Asked further as regards the creation of an Indian Bar and whether the High Court should continue to enrol advocates, or whether this should be left to a Council of Legal Education, Lord Haldane said :—

"Call your barristers and make your own barristers. The High Court is not an administrative body. Set up your Council for call to the Bar and a Committee to superintend legal education. Say to the students : 'You must come with a degree from the University,'—the Bar being treated as something post-

graduate to that. You must then show that you have studied practically with the vakil or with somebody at the Bar—just as here, and you must also show that you are qualified in the various system of law which you know."

All questions of legal education, control, enrolment and disciplinary action should be transferred to that body.

Questioned regarding the precedence which barristers of the Inns of Court took over vakils in India, the witness said he did not like it. Some of the vakils were very able men and were put at a disadvantage; he would like to see people who pleaded in Indian Courts all barristers. In Ontario, for example, you would find a firm of barristers and solicitors; they were probably all barristers who divided themselves into two groups. He thought that was a better system. He would place all vakils and barristers on the same footing. There was only one real safeguard, and that was to have an *espirit de corps* among the Bar, and a high standard of honour that would search out and repress iniquities far better than any amount of technical rules.

Asked whether he considered it desirable to remove the clause which said that one third of the Judges of the High Courts in India should be barristers, the witness thought that he thought it was quite right if the barrister was a person created in India, but wrong if he had to come here to become a barrister. The present provision might be deleted from the Government of India Act, but it would be better to take power to call people to the Indian Bar and then it would be all right.

In reply to a question whether vakils were not permitted to appear before the Privy Council, Lord Haldane said that they were so allowed. If anybody said to them that he was duly qualified to appar in a Court of Law in India, the Privy Council would say, that he was duly qualified to appear before them. They did not listen to technicalities, and he was not aware of any restriction having been established by precedent, by which only a member of the English Bar could appear before the Privy Council, and he did not think they would establish such a precedent now.

*Minute by the Hon'ble Mr. Justice Ashutosh Mookerjee on the Legal Practitioners' Amendment Bill of Mr. K. C. Neogy, M.L.A.**

* * * * *

Next as to matter.—Here the Bill in my opinion rests on very strong ground. I have had occasion to record my opinion more than once that an alteration is imperatively called for in the present system. A system which rendered it impossible for a Dwarkanath Mitter and a Rash Behari Ghose to take up cases on the Original Side, merely because they were vakils and not barristers, stands self-condemned. The incongruity of the present system becomes manifest when we remember that a vakil as soon as he is appointed a Judge, becomes qualified to hear cases on the Original Side, to determine appeals from the Original Side and to preside over the Criminal Sessions. If he resigns his seat on the Bench and reverts to the ranks of the profession, he is relegated to the status of a mere vakil with the inevitable consequence that his admission to the Original Side is completely barred. A vakil is competent to argue a case of the utmost complexity and involving subject matter of the highest value, provided it has been brought upon appeal from a District Court. But if a similar case has been tried on the Original Side, a vakil is not competent to take charge of the matter on appeal. The more we explore the matter, the more obvious it becomes that the present system in indefensible.

"Whenever a reform is sought to be introduced, it is usual to speak of vested interests. I am free to confess that vested interests do not press me in this connection. No reform in any sphere of life would be possible if vested interests were to be left untouched. The same argument was used without success when the proposal was put forward to admit Indians into the highest offices in the gift of the Crown; and it is significant that the British Parliament has now thrown open the Law Membership of the Council of the Governor-General to vakils, although it had

* Published in the Servant of the 18th July 1923.

been reserved for barristers for half a century. The argument based on vested interest has further this element of weakness, namely, it assumes that barristers who have now a monopoly of admission into the Original Side will not be able to hold their own against the vakils, who will prove themselves equally competent for the work. If this be true, the demand made by the vakils is irresistible. I do not apprehend however, that the barristers will meet with the disaster foreshadowed. Every barrister is in theory entitled to practise on the Appellate Side; but it is only a select few whose services are requisitioned by the litigant public. It is more than probable that the same thing will happen if the Original Side were thrown open to the vakils.

"There is another feature of the existing system which cannot altogether be ignored. It has now become the fashion for a young man to get himself enrolled as a vakil of the High Courts, and, if he has the means, to start off at once so that he may become a barrister. The conditions of life which many of such young men have to lead while in England, are described in the recently published report of the Lytton Committee. Most of them are able to pass the requisite examinations in the course of a year and to acquire such knowledge as may be obtained in the chambers of a barrister, not always known to fame. These youngmen on return are deemed qualified to practise on the Original Side, while men of the highest ability, learning and experience amongst the vakils are debarred as members of an inferior branch of the profession. I am not able to reconcile myself to this as a justifiable or even a desirable state of things.

During the last forty years the vakils have repeatedly approached the Court with a request that the disabilities from which they have so long suffered should be removed. Individual judges, including myself, have drawn up schemes from time to time for the purpose. But we have always found ourselves in the minority. Every High Court in India except our Court has taken steps in this behalf. But we still stand as the solitary stronghold of conservatism. The Legislature is now called upon to intervene; however much undesirable in theory the intervention of the Legislature in such matters may be, I am not surprised

that the attempt has been made. In the interests of the Court itself, I feel we should have moved with the times so as to render unnecessary any intervention on the part of the Legislature.

"Finally I notice that in the letter which has been sent up to the Government of India from the Court it is stated that I do not dissent from the conclusions of my colleagues. There must have been some misapprehension on the matter. I reserved my opinion on the subject. I agreed with the other Judges upon one point only, namely, undesirability of alteration of our Letters Patent at the instance of the Legislature. Upon the question of the position and status of the vakils, my views are well-known. They have been expressed in more than one memorandum, submitted to the Court from time to time. They have undergone no alteration; on the otherhand they have been strengthened by experience. To my mind it is clear that the change has to come —whether this will be effected by the Court itself or by the Legislature, I shall not undertaken to prophesy."

(Sd.) ASHUTOSH MOOKERJEE.

Calcutta,
The 17th May, 1923.

CHAPTER III.

PREPARING THE FACTS.

A good advocate must have a thorough grasp of the facts concerning his case. Without a complete mastery of the facts, he can neither cross-examine efficiently nor argue well. An advocate may be endowed with extraordinary talent or skill, but he cannot conduct his case properly unless he takes pains to equip himself thoroughly with a knowledge of the facts. There can be no success without preparation. The man who goes to conduct or argue a case on the strength of his eloquence or wit without a careful preparation, cuts a sorry figure and realises his helplessness in no time.

The first thing a practitioner ought to do when a client appoaches him with the purpose of getting a suit instituted or a written statement drawn up, is to make himself thoroughly acquainted with the facts of the case. He should attentively listen to his client's story and see whether the facts as narrated by him constitute a clear and distinct cause of action, or in other words afford sufficient grounds for proceeding in a court of law. In the case of a defendant, he should see whether the facts are sufficient to make out a defence capable of being relied upon.

Zeal in his cause induces a client to exaggerate his claim. He is unconsciously led to conceal those weak points in his case which his legal advisor should know in order to form a correct estimate of it. If we take into

consideration the fact that the majority of the litigants here are illiterate, the importance of not relying too much on the client's version of the story will be at once apparent. The advocate must therefore take the utmost care to ascertain the real facts of the case. It is true that he is not bound to disbelieve the facts stated by the client, but at the same time it would be unwise to swallow his statements wholesale without discrimination. In any case he should not allow his client to know that he regards this or that portion of his story as absurd. An idea at the outset that the advocate looks upon his story with suspicion or scepticism, is bound to annoy the client and make him lose his confidence in his lawyer. It is seldom that a litigant lays bare the whole facts before his lawyer. Anxiety for his cause prompts him to distort or suppress facts that may go against him or to magnify facts in his own favour. It also generally happens that material facts remain untold because the client has not been asked about them. The lawyer is thus put to an embarassing situation. He cannot offend or annoy his client by telling him point blank that he does not consider his statements to be entirely true and yet it is very important that he should get at the real facts. To achieve this end, he must, after hearing the client's version, proceed to examine him by putting pertinent questions. When the details and circumstances of a fact are wanting, he should try to gather them by leading him with fair and honest questions. He must inspire his client's confidence by sympathising with him and persuading him to make a clean breast of his affairs. He must also know how to worm out of him by cross-examination or by coercion, if necessary, all facts which a client is disposed to with-

hold in order to conceal his faults or the weak points in his case. After having heard the client's version with patience, he should play the part of an unbeliever and ask him questions bearing upon all imaginable objections in order to get at the real position. The client is apt to conceal facts or documents or to exaggerate their importance. To avoid surprise at the trial, the real facts must be within the advocate's knowledge and a rebuke too is sometimes necessary to have a full disclosure of all facts. If the weak or doubtful points are ascertained beforehand, he can devise means for meeting them. Properly managed, a weakness is sometimes turned to advantage.

The case must be investigated with the greatest care and thoroughness. Advice cannot be properly given or action cannot be taken before the facts and the law of the case have been mastered. Wrong advice or negligence in bringing a suit is a gross failure of duty and make the lawyer liable in damages. Hardwicke says: "Suits by clients against their attorneys are much more frequent now than formerly, and Courts have in many cases held attorneys liable for negligence. It is but just that it should be so. Families are often ruined by the errors of incompetent or negligent lawyers. There is an instance in record, where by the omission of one word, an eminent English lawyer, Mr. Butler, in drawing a will caused a devisee to lose an estate valued at £15,000 per annum. If an accomplished lawyer like Mr. Butler should inadvertently make such a serious blunder, how careful should lawyers of ordinary ability be in the transaction of all legal business. The general rule is, that a lawyer is responsible to his client only for the want of

ordinary care and skill that constitutes gross negligence." (Art of Winning Cases, p. 2).

"It is a great wonder that suits are not oftener brought by clients against their attorneys for neglect of business than are brought. Then, too, occasionally, a judge will feel called upon to administer a rebuke from the bench to counsel for his negligence in the conduct of a suit, and this public censure is always calculated to greatly injure an advocate". (Hardwicke, p. 11). An advocate is bound to use reasonable care and skill in the discharge of his duties. Failure to use reasonable care and skill makes him liable for loss sustained by client, like the members of any other profession. It is his business and duty to know the law. He cannot plead ignorance. He is always liable to his client for negligence and even an agreement that he will not be liable does not protect him. It would be void (see s. 5 of Act XXI of 1926). When a professional gentleman accepts instructions to file an appeal and the client loses his right of appeal on account of the negligence of the lawyer, he would be liable in a Court of law (37 All. 267). When a pleader allows the essential points in a case to be overlooked, the decree cannot be vacated for fraud, though the pleader may be liable for misconduct [59 I.C. 752 (Cal.)]. Cases against lawyers for wrong caused by gross negligence or want of ordinary care and skill or diligence are rare in our country not because there are not many such incidents but because the majority of the clients are not sensible of their rights. Not long ago an advocate of the Calcutta High Court was suspended from practice for not causing an appeal to be filed within the period of limitation, although he had accepted the

engagement. The usual defence that the advocate was deceived by his clerk who assured him that the appeal had been filed was not accepted (*In re S*, 1928 Cal. 820 F.B.). There have however been quite a number of cases in Calcutta against attorneys for negligent or fraudulent conduct.

"When he has spent time enough in giving his client a patient hearing, he must assume another character, and act the adversary's part, stating to him all imaginable objections, and whatever the nature of the disputation may bear. He must ask him some shrewd questions, and press him closely for direct answer ; for whilst enquiries are made into each particular, we at length hit upon the truth, when least expected. In short an unbelieving advocate is best at learning the merits of a cause ; for the client generally makes mighty promises, averring that he is able to produce a cloud of witnesses, that he has authentic and well attested vouchers, and that the adversary himself cannot help the giving up of such and such points. . . . . Having thoroughly examined the cause by taking an exact view of everything favourable or contrary in it, he must lastly act a third part by assuming the character of a judge, and by imagining the cause to be pleaded before himself. Then what should move and determine him, if he was to pass sentence upon the same matter, he must think the most cogent and powerful to determine any other ; and so he will seldom be deceived in the event, or it will be the fault of the judge" (Hardwicke, pp. 9, 10, 11).

It is not enough to examine the client minutely and the advocate must also examine each witness separately from the other witnesses and see whether they

bear out the facts narrated by him. Chitty in his General Practice says: "Either the principal or a very experienced clerk, who will afterward attend at the consultation and to the conduct of the cause at the trial, and who will be above the suspicion of tampering with the witnesses, should personally, and in the absence of his client, see and examine each witness apart from the other, so that one may not influence the other as to the exact testimony he will give, and he should particularly inquire whether he has any interest in the event of the action, or whether there are any circumstances which might affect his competency in the opinion of the judge or his credit in the estimation of the jury." It is better to take down in writing the substance of what the witnesses say. Persons examined should be warned to state those facts only which are within their knowledge. They must be told to state facts only and not their opinion or inferences. Intelligent and honest witnesses should be picked out and the rest discarded. The testimony of one foolish or dishonest witness will destroy the good effect produced by the testimony of all other witnesses. When the matters spoken to are not capable of direct proof, it is better to ascertain the inferences and the hypothesis that the client has framed. But the advocate must weigh the facts and see for himself how far the inferences are supported by the facts of the case. After he has gathered all available facts, he must weigh them carefully, arrange them and construct his own theory of the case. To sum up, he should try to get from his client, the truth, the whole truth and nothing but the truth without which it would not be possible for him to advise his client properly and to form a correct estimate of his client's case. If he

neglects to make this preliminary investigation and to prepare himself before he proceeds to draft the pleadings, he runs the risk of setting forth matters which, when the case comes on for hearing, will be found to be absolutely contradictory and unfounded. It requires experience and skill to discern what facts would help him most in winning the cause. The strong points in a case should always be placed in the forefront. Lord Abinger said that his practice was to hunt for and secure the strong points.

The advocate's task is not complete when he has obtained all information of the facts. He should then turn his attention to the means by which they are to be proved before the Court. Facts are established by oral evidence, documentary evidence and circumstantial evidence. As regards oral evidence, the quality should be aimed at and not the quantity. Evidence is weighed and not numbered. It is wrong to suppose that a point may be established if only a large number of witnesses can be called to prove it. On the other hand the greater the number, the more the risk that they would contradict each other by discrepant and inconsistent statements. A fact may be established by a small number of witnesses, if their testimony is consistent and reliable. In deciding upon the witnesses he should call, the practitioner should have special attention to their antecedents, character, social position and integrity. As they are to be subjected to the fire of cross-examination, they must not be weak in intellect or nervous. Very great discretion is necessary in selecting the witnesses. Here also the advocate should not rely entirely on his client's assertion as to the nature and particulars of the evidence expected from them. If he calls any and every witness to please his client, he is sure to find soon to his utter surprise

that the witness would say many things entirely different from what he was assured he would say. It is therefore essential that the practitioner before he decides to put a witness to the box, should have some idea of the evidence he would give. "If the lawyer in preparing his brief should note opposite a statement of what each witness will swear of, the peculiarities, characteristics, etc. of the witnesses, he will find it advantageous in the conduct of his case. Entries of this kind should be brief and to the point; for instance: "This witness is too zealous, he should be held with a tight rein." "This is a stupid witness and should be dealt with patiently." "This is a lying witness and he should be examined with severity." "This is a timid witness and should be treated with the greatest kindness," etc. (Hardwicke, pp. 16, 17).

In most cases, documents form important matters of evidence. The advocate should scrutinise very carefully the contents of all documents, letters etc. in his client's possession in order to find out which of them should be offered in evidence. He should satisfy himself that they are genuine and are properly executed, stamped and registered, in cases where registration is compulsory. He should on no account rely on any document or allow it to be tendered in evidence unless he has an opportunity by personal inspection or otherwise to satisfy himself that it really supports his client's case. The safer course is to insist on the production of every document, for inspection by the advocate before it is put in the list of documents relied on by the client. It is dangerous to rely upon a client's representation of the contents of a document, or of its existence. It has on many occasions proved disastrous. In most cases the documents do not contain all

that are promised or they contain less or they have something which goes against the party. When there is serious doubt about the genuineness of a document, it is imperative that an investigation should be made as to its authenticity. If a practitioner allows a document to be put in without taking care to ascertain that it is really what his client asserted it to be, he should not be surprised if it is found afterwards to contain matters which disprove or injure his case or which is entirely irrelevant. It is better to make a memorandum containing the following particulars: (i) parties to the documents ; (ii) short summary of contents ; (iii) dates ; (iv) how and by whom to be proved.

The brief should then be prepared in an orderly and methodical manner by noting the substance of the testimony of each witness, a memorandum of documents which will be necessary to establish the clients case or to disprove the opponent's case. All these should have reference to the allegations in the pleadings which have to be supported or denied. The custom of making a brief of the facts is strictly adhered to by almost all eminent lawyers. It is very much neglected here, but the necessity of such a course cannot be too strongly impressed. It is a matter of frequent occurence to see a lawyer feeling considerable embarassment and looking to his client or clerk, whenever th Court asks for some date or fact or other information. In England briefs are prepared for the counsel by attorneys and Dillon says: "The brief should contain an abstract of pleadings, a clear statement of the client's case, and a proper arrangement of the proofs with the names of witnesses. The grand rule to be followed in the drawing of briefs is conciseness with perspecuity." "It is of great importance that the advocate should, at the very outset,

make proper notes of the facts of the case. It is a very serious defect in the way in which business is carried on by pleaders in this country that they make as few notes as possible. You may rest assured that the probabilities are that the advocate would forget a very large proportion of the facts, if he does not make a proper note of them. When the facts are fresh and vivid in the mind, it is a common frailty to suppose that one would remember them afterwards. They are generally forgotten within a very short time. The result is that papers have to be studied over and over again, while a proper note made in time would have saved a great deal of time and labour. It is not merely with regard to the facts that it is desirable that notes should be made. That is desirable even with regard to one's own researches and one's own thoughts" (Aiyar's Professional Ethics, pp. 380-381).

The investigation into the facts is not complete without a scrutiny into the surrounding circumstances of the case. Probability is the offspring of circumstances and in many cases circumstantial evidence is the only evidence available. The direct testimony may be weak or improbable, but direct evidence coupled with circumstances render what is improbable probable and not unoften create a conviction which will decide the case in the client's favour. Care should therefore be taken to probe and enquire into the circumstances that surround the facts. In trying to ascertain the circumstances, the minutest deails should be taken account of, for things which at first appear detached or of little value, will when grouped together, form a connecting link furnishing a valuable clue to the matter in inquiry.

Having thus prepared himself with the facts, the

advocate should proceed to draw inferences and to form his own conclusions. The direct evidence cannot be utilised helpfully unless inferences are drawn and a definite theory of the case is constructed.

Rufus Choate was one of the greatest of modern American advocates and orators. His method of preparing cases was as admirble as thorough. He was an indefatigable worker and devoted considerable time in the preparation of the law and facts of his case. It has been said of him, "that in determining the theory of the case he was never satisfied until he had met every supposition that could be brought against it." One of his biographers says: "If for the plaintiff, a strict examination of all the pleadings, if the case had been commenced by others, was immediately made, and, so far as practicable, personal examination of the principal witnesses, accurate study of the exact questions raised by the pleadings, and a thorough and exhaustive preparation of all the law on these questions. This preparation completed, the papers were laid aside until the day of trial approached. At that time a thorough re-examination of the facts, law and pleadings, had to be made. He was never content until every thing which might, by possibility, bear upon the case had been carefully investigated and this investigation had been brought down to the last moment before trial. If for the defense, the pleadings were first examined and reconstructed if in his judgment necessary, and as careful an examination of the law made as in the other case."

CHAPTER IV.

ETHICS AND PROFESSIONAL ETIQUETTE—RIGHTS, DUTIES AND PRIVILEGES.

Every profession has its code of ethics and the Law is no exception. If a man engaged in any kind of business or profession, is dishonest or ungentlemanly, it certainly does not enhance his reputation ; and if the number of such men are many, it stigmatises the whole profession. Honesty and gentlemanly conduct are prized in every sphere of life and gentlemanliness in a lawyer covers a multitude of sins. An advocate who is a gentleman to his finger tips commands the respect of the Court and the public, although his legal attainments may not be of a very high order. In the old days members of the legal profession were designated in England as 'gentlemen,' *e.g.*, "A gentleman of Lincoln's Inn," "Gentlemen of the Robe" or "of the long Robe." "I was prevented by a sudden fit of illness from attending ; but I learnt from a gentleman of Lincoln's Inn, that the order was confirmed"—(*King* v. *Waller*, 1882, Lofft. 50). Walsh says in his "Advocate" (p. 19): "The first duty of an advocate is to be a gentleman. If he does not possesses the natural instincts of a gentleman, he will constantly find himself in trouble. One may be quite sure that an advocate who is known to be quarrelsome, and who constantly falls foul of the Bench, is consciously or unconsciously stepping over the line, and, in his zeal

for his client, is forgetting himself and his duty to others. It was Macaulay who once said of the paid advocate, that a man had only to put on a wig and he could say and do with impunity for a guinea which no gentleman would permit himself." It is the instincts of a gentleman and the respect for his profession that will protect an advocate from allowing himself to be made a tool in the hands of his client when cross-examining a witness to credit. How often is the privilege abused and the witnesses are maltreated and wantonly humiliated by insulting and annoying questions under the pretence of cross-examination to credit! One is tempted to say that mud throwing has been reduced to a fine art. The subject will be referred to again in chapter V and the chapter on cross-examination (Ch. XVI). Cockburn, L. C. J. said: "The way in which we treat our witnesses is a national disgrace and a serious obstacle, instead of aiding the end of justice." "In Court, in his office, in society, at home, let him never forget that he is a gentleman, and that he belongs to a highly honourable profession, the dignity of which he must sustain. Let him be sure that no word escapes his lips which he would not repeat in the presence of the most genteel company, and by being thus guarded in conversation, he will acquire an elegant style, undisfigured by common or course expressions, which will be of incalculably great advantage to him in the practice of the law, especially in the conduct of cases in court, in the argument of cases and in the examination of witnesses" (Hardwicke, p. 459).

All round honesty and integrity are virtues which have a very high place in the legal profession. They give strength to an advocate and enable him to earn a

reputation which inspires confidence in the tribunal and the client. Honesty does not mean uprightness only in money transactions. Suppression of the real situation of a case from the client in order to make him fight for personal gain, acceptance of more briefs than one can attend to when cases are called on for hearing in Courts, a hint conveyed to a witness through a leading question, coaching a witness, are but a few instances of dishonest dealings. A departure from the path of honour and integrity can never lead to good results. Conviction that he is espousing a right cause, gives the advocate power. A guilty conscience unnerves him and makes him stumble at every step. Rufus Choate one of America's greatest advocates once said: "I care not how hard the case is—it may bristle with difficulties—if I feel that I am on the right side, that case I win." Man has an innate sense by which he can discern right from wrong and it is not at all difficult for an advocate to find out when a client approaches him with a fabricated case. It is always a safe rule to keep the witnesses on the solid ground of truth. Chitty in his General Practice says: "Every honourable practitioner at all events will take care that no part of his client's intercourse with the witnesses can have the least influence upon him to give his testimony otherwise than strictly according to the truth, and without evincing the slighest partiality to either party. Indeed in prudence and in policy this is of the utmost importance to the client's interest, because the least improper interference with a witness might so disgust a jury as to induce them to find a verdict against a client, although law and justice might on the whole, be in his favour." The least suspicion that the witnesses have been tampered with or

corruptly influenced will create a feeling against an advocate which will ruin his case irretrievably.

It is not a lawyer's business to falsify facts, to invent defence when the truth is on the other side or to conceal a wrong by practice of deception. It is no less objectionable to make false or baseless suggestions when putting forward a client's case before the Court. A mooktear for the defence went to the court sub-inspector of police and obtained the case diary from him and was found taking notes from it. Both of them were convicted. There was a rule before the High Court for enhancement of sentence and advocate for the accused proposed to enter into a discussion of facts taking advantage of the principle that since there was a rule for enhancement of sentence, he was entitled to show that the accused should not have been convicted and the whole case was concocted by the police officers who arrested the accused. The Chief Justice pointed out that he was at liberty to take such a course, but should it be found that the aspersions on the character of the police officers were without foundation, the circumstance would greatly aggravate the offence and the sentence would be substantially enhanced. Ultimately, the advocate decided not to go further and confined himself to the legitimate arguments against the rule. In the course of the judgment Terrell, C. J. observed: "It is extremely common for advocates for the defence to argue that the prosecution story is an entire concoction on the part of the police and in the vast majority of cases no evidence whatever elucidated in cross-examination or offered by examination-in-chief, is ever produced in support of this argument. Now, either the contention is raised on the direct

instruction of the client or it is deliberately raised by the advocate without any instructions at all. In the former case, the accused has added to the heniousness of the offence with which he is charged by a baseless accusation of outrageous conduct on the part of the police .....or other prosecutors. In a clear case of this kind the tribunal should take this into account as a circumstance of aggravation in awarding the sentence. In the latter case, that is to say, where the suggestion is made by the legal practitioner without reasonable cause, the legal practitioner is guilty of the grossest professional misconduct" (*Banslochan* v. *R.*, 9 Pat. 31.: 1930 P. 195).

Lord Bolingbroke spoke of the legal profession thus :— "In its nature the noblest and most beneficial to mankind, and it its abuse the most sordid and the most pernicious." It is only a dishonest litigant who thinks that the services of a lawyer can be engaged for any purpose. Pollock, C. B. said: "I always said, I will be my client's advocate, not his agent. To hire himself to any particular course, is a position in which no member of the profession ought to place himself" (*Swinfen* v. *Chelmsford,* 1860, L.T. Vol. II, N. S. 413). "While it is true in a broad sense that an advocate is bound to act according to the instructions of his client, there are several matters in which he ought not to do so. In deciding what is proper to be done during the conduct of a case, the advocate ought not to yield to the opinions of his client. A client no doubt has a right to decide for himself what rights of his should be pressed, but he has no right to require his advocate to do it in the manner he chooses. In other words, the advocate fights for his client but he has not to take the rules of warfare from him. Unfortunately, it

is too often the weakness of advocates, arising no doubt, from a desire to retain their clients and to win more clients, to defer too much to the wishes of their client. This is sometimes carried so far as to abuse the opposite side, to abuse the witness who appear in support of the case of the opponent and generally to abuse every one connected with him. In these matters a client ought to have no voice" (Professional Ethics, pp. 159, 160). In *Strauss* v. *Francis*, 1866, L.R. 1 Q.B. 379 Mellor, J., said: "No counsel, certainly no counsel who values his character, would condescend to accept a brief in a cause on the terms which the plaintiff's counsel seem to suggest, viz., without being allowed any discretion as to the mode of conducting the case. And if a client were to attempt thus to fetter counsel, the only course is to return the brief." The duty of an advocate is no doubt to put one side of a case, but this does not mean that he can utter anything howsoever silly or wicked and take shelter under the plea that he is the mouthpiece of his client. As a member of an honourable profession he has duties towards himself, his client, the public and the Court. He must refer to his conscionce and the traditions of the bar, as to whether a particular statement should or should not be made. Difficulties will not unoften arise as to what is proper or not, but in all such moments, the advocate must depend on his conscience and exercise his judgment upon a careful consideration of the facts. If he feels inwardly that a particular line of action should be taken, or a particular thing should be said, his duty is clear. In a recent case Terrell, C.J., had occasion to observe:— "It is perfectly true in one sense that a legal adviser must accept statements of fact from his client. But the

privilege of the legal adviser has a tendency and a very grave tendency to be very much abused and nowhere is the abuse so manifest as in applications for transfer. It has become notorious that applications for transfer based upon the alleged prejudice and unfairness of the magistrate, have developed to an extent which is a scandal and it would be well that professional advisers and more particularly young professional advisers should bear in mind that there are certain kinds of duties which they have to perform in setting forth the case of their clients in relation to which they cannot take shelter, as they are in the habit of doing, behind the instructions of the client. One sees this plea of legal professional privilege taken up not only in applications of this sort but also in pleadings. Nothing is more conspicuous in pleadings than allegations of fraud, forgery and so on made against the other side which when the case comes up for hearing are never substantiated in the slightest degree. Statements imputing prejudice or unfairness or corruption to magistrate should not be made unless the statements of the client as tested by the adviser are found sustainable, unless they are found to be corroborated and unless the adviser has taken some steps not necessarily to pledge himself for his client's veracity but such as to give him as a reasonable man grounds for belief that the statements at any rate are such as should be properly investigated. The duty of the legal profession is a very serious one both with regard to applications of the kind I have mentioned and also in respect of pleadings" (*In Re N, a Pleader*, 1929 Pat. 151 F.B.).

"If counsel is instructed, he ought to have control over the case and conduct it throughout. His authority

may be limited by the client, but only to a certain extent ; and it is not becoming for him to accept a brief limiting the ordinary authority of counsel in this respect, or to take a subordinate position in the conduct of a case, or to share it with the client, even if the litigant is himself a barrister ; the litigant must elect either to conduct the case entirely in person or to intrust the case entirely to his counsel. If a litigant instructs counsel, the litigant cannot himself be heard, unless he revokes his counsel's authority and himself assumes the conduct of the case, and when a case is fairly before the court and counsel is seised of it, his authority cannot be revoked" (Hals. Vol. II, para. 666).

"I need hardly say that no advocate should be guilty of instigation or encouragement to produce false evidence. In discussing a case with the client or his agent or adviser, care should be taken that no hint is dropped which will serve as such instigation or encouragement. Of course it is impossible not to discuss the legal bearings of a case and to consider what is the evidence that would be required to prove the case. Such statements may lead to the production of false evidence. I can only advise you to be as careful as possible to see that you make no attempt to put the matter in such a way as to instigate the production of false evidence or the suppression of documents" (Professional Ethics, pp. 64, 65). One way of doing it would be to enquire first about all the evidence available without telling what particular evidence would be necessary for a judgment in favour of the client. A lawyer is guilty of unprofessional conduct by paying or offering to pay money to a witness to induce him to speak the truth or to prevent him from giving false

evidence (*In re Nittya Gopal Sen*, 4 C.W.N. 45). A lawyer advising his client to absent himself at the time when the case will be called on for having the case dismissed is guilty of unprofessional conduct (*In re a Mukhtear*, 56 P.R. 1902).

It is always dishonourable and loathsome to "coach" a witness. It is equally dishonorable to tell a client of the evidence he must have in order to win his case. It is bound to be interpreted as a hint or an instigation to fabricate evidence. A schooled witness can never advance any cause, and is sure to be found out during cross-examination. Apart from the moral turpitude involved in coaching, it must on almost every occasion damage a client's case and bring suspicion also on that part of the evidence which is not untrue. A client is entitled to the skill of an advocate but not his conscience. An advocate who is conscious of being a party to a corrupt practice, loses his strength and can never argue or conduct his case with the force or confidence which is inherent in a man of virtue. He can make any use of the materials at his disposal and can offer any suggestion that may be justified by the facts and circumstances. He may build his own theory when presenting the facts, but he must not misrepresent them or misuse them with the object of perverting the truth.

It should be remembered that an advocate should not allow himself to be employed for any purpose which is not honourable. Clients who come for advice to accomplish illegal designs or to deprive a man of his just rights, should be shown the door or handed over to the authorities. But at the same time an advocate has no right to disbelieve his client and when a case is presented to him, he must

ordinarily assume that the client's version is true. If he cannot persuade himself to believe all what the client says, it is nothing more than a belief. His opinions do not concern the client. His duty is not to judge but to take up his case to the Court and use all fair means to plead his cause. Cases that appear to be improbable on the surface have nevertheless been found to be true afterwards. But if during the progress of a case the advocate is certain that fraud has been resorted to e.g., the foisting in of a forged document or the production of a perjured witness to testify to a fact which he was previously told did not exist, he has a perfect right to throw down his brief. Every honourable man would do so under similar circumstances. Communications made to him in the course and for the purpose of employment are absolutely privileged except a communication in furtherence of an illegal purpose. The law on the subject is to be found in s. 126 of the Evidence Act. This privilege rests on the moral obligation to respect the confidence reposed on a lawyer when a client goes to consult him regarding his affairs. The privilege is the privilege of the client and it is he who can waive it. It continues even after the employment has ceased.

The ordinary rule is that an advocate is bound to take up a case and lend his services whenever they are sought. As pointed out above, he has no right to disbelieve his client or to assume the function of a judge. At the same time difficulties may sometimes arise when the advocate finds that the claim put forward is manifestly dishonest or fraudulent. It may be safely said that the advocate has in such a case the right to refuse the brief and it would certainly be proper to do so. But there may be claims of a nature which the law cannot

control although fraudulent. As to these Sundara Aiyar writes: "There may be cases where the claim is so unconscientious or fraudulent, though the law is not able to circumvent the fraud, that it would not be wrong to refuse to appear in support of the claim which the law recognises. I hesitate to go so far as to say that any one would be acting wrongly in taking a case which the law will sustain ; but then the advocate's duty is clear thus far, at least, that he should do in such a case no more than his strict duty to his client requies, and that he should not by any act of his facilitate the perpetration of the fraud (Professional Ethics, pp. 172, 173). "The rule in England is that in all but a few exceptional instances an advocate is bound to accept any retainer that is offered to him. His own opinions as to the character of the persons invoking his services, or as to the merits of the claim or defence, or as to the morality of the law which applies to the controversy, is no ground for declining his services. Nor are considerations of expediency or personal advantage allowed to influence his acceptance or rejection of the brief offered. The duty is, broadly speaking, absolute and is correlative of the monopoly which advocates are permitted to enjoy" (Professional Ethics, pp. 190, 191).

As to belief in a clients case, Lord Darling thus writes in *Scintilla Juris* :—"It is doubtless of great moment that an advocate should appear to believe in his case, as he is then more likely to convert others ; but I think that most counsel would be better advocates did they content themselves with simulating the belief, instead of actually embracing it. The manifest appearance of a believer is all that is wanted ; and this can well be acted after a

little study, and will not interfere with that calmness of judgment which it is well to preserve in the midst of uncertainty, and which does not appear to be consistent with much faith. It is common practice to conclude speeches with a burst of indignation ; such a feeling concerning the wrongs of others is the shortest-lived of all the passions. I would rather touch last upon prejudice, for it endures like bronze, and is easily written with the acid of epigram."

Zeal in his cause and constant thought over it make a client biassed and if the advocate has reason to doubt the successful result of the action, it is honest to tell him point blank the weak points. He does not come to him for being inspired with false hopes or flattered. And although some of the clients will not relish plain talk at the outset, they will value the advice after they have been told the same thing by others or after they have suffered defeat in litigation. If a ruinous and useless litigation is averted by a timely advice, the advocate will earn the gratitude of his client. He will realise in no time what a lot of money and trouble would have been spent in fruitless litigation and will doubtless recommend the advocate to his friends. Of course there are some clients who are determined to fight at all costs and will never be content till the decision of the Court settles the matter ; but happily their number is not many. Many of them have an exaggerated idea of their claims or will not appreciate the force of a legal bar and will pursue the contest, come what may. If a client comes with a case or a defence which is palpably false, it may present considerable embarassment. If the lawyer is reasonably certain or has knowledge from some other source that the case

is false, the better course would undoubtedly be to advise the client to seek the assistance of another lawyer. But it should not be forgotten that a litigant is entitled to the services of an advocate and the latter has no right to disbelieve him. If his conviction is against the client's version, it is only a belief. His duty is not to judge but to put his client's case before the Court. As pointed out before, if he finds that the case or defence is weak or untenable in law, it is better to tell the client the exact position so that he may judge what course to adopt before he takes the plunge. I am aware that many young lawyers would say that plain speaking during the first few years of struggle would make them lose clients. But it is a shortsighted policy and everyone in the profession is bound to realise it sooner or later.

Again a client may have a perfectly good case which the advocate believes to be true. But at the same time there may be difficulties in the way of success. In a situation like this it is his duty to tell frankly that no redress is possible inspite of the justness of the claim. A question may arise whether it is open to a lawyer to refuse the brief of a case in which the chances of success are very slender. Some are apt to do so with the object of preserving their reputation. But it seems that a lawyer cannot refuse to take up a case simply because it is a rotten one, although it would be perfectly proper, nay it would be his duty, to tell the client what the real position is. "The advocate should invariably advise his client to do, as he would do, if he were placed in his client's situation and if his chances of success are not good, he should frankly tell him so. He is acting dishonestly and unprofessionally if he induces him to engage

in a suit in equity, or an action at law, "for the purpose of obtaining a larger fee from him, than he would charge if the matter should be settled without litigation" (Hardwicke, p. 1) "A silly writer asked the impertinent question in a periodical we thought too respectable to publish such an article, "Can a lawyer be honest?" No man of sense who has read the biographies of Hale, of Marshall, of Choate and thousands of other legal luminaries can ask such a foolish question" (Hardwicke, p. 457).

A question of some nicety is what course an advocate should adopt if during the trial he is convinced that his client has no case. An instructive case on the point is that of *Earl Beauchamp* v. *The Overseers of Madresfield*, L.R. 8 C.P. 245. The facts are that the names of the appellants who were peers, appeared in the list of persons claiming to vote in respect of freehold houses and lands, but were removed by the revising barristers on the ground that being peers they were not entitled to have their names in the register of voters for the House of Commons. The counsel of Lord Beauchamp, the appellant, in opening the case said that it was difficult to contend that such a right as his client asserted existed, when every principle of the constitution and all the authorities upon the subject were opposed to it. He then argued the matter at length and laid before the Court all the authorities he could find on the subject—all against his clients contention. Keating, J., after stating his reasons for agreeing said: "I would merely desire to add an expression of my entire approval of the course pursued by the learned counsel for the appellants, and to say that I have yet to learn that it is otherwise than the duty of counsel to say so when he finds a point not to be arguable. I have always under-

stood it to be the chief function of the bar to assist the court in coming to a just conclusion." But Brett, J., said: "I feel extremely reluctant to give any judgment in this case. The course which has been pursued by the counsel for the appellants has placed the court in great difficulty. I must confess I entertained considerable doubt whether the claim set up could be supported, but I thought it right to make some suggestions for the purpose of ventilating the propositions stated by the learned counsel in admitting that they had no case. I quite agree that it is the duty of the counsel to assist the court by referring to authorities which he knows to be against him. But I cannot help thinking that when the counsel has satisfied himself that he had no argument to offer in support of his case, it is his duty at once to say so, and to withdraw altogether. The counsel is master of the argument and of the case in court, and should at once retire if he finds it wholly unsustainable unless indeed he has express instructions to the contrary. With the greatest respect for the two learned counsel who have appeared for the appellants in this case I must confess I do not quite approve of the course which they have taken." It is somewhat difficult to see what impropriety was there in the conduct of the counsel for appellant Lord Beauchamp when he intimated the court that the principle of the constitution and all available authorites were against his client's contention, when it was as a matter of fact so and the Judge was fully aware that there were no materials to be placed before him to arrive at a contrary conclusion. The rule no doubt applies only when the point in issue is well settled by authoritative decisions. But there may be cases where the point is one

of first impression or where inspite of the conclusion that may naturally seem to follow, the point may be argued from a different standpoint. It seems that in such cases, the advocate instead of conceding in despair that the point is not arguable, ought to offer all arguments that may be made in favour of his client's contention. What may appear to him trivial or unsustainable, may be accepted by the judge as cogent or plausible. He has no right to assume the functions of a judge or to anticipate his views. Of course this does not mean that an advocate should advance an utterly absurd argument.

The experience of having a confession of guilt from an accused must be rare in an advocate. Even in cases where the strongest suspicion exists, an accused person does not give up his position of innocence. Inspite of the gravest doubts as to the innocence of the accused, an advocate is bound to appear for him and to employ all legitimate arguments arising from the facts and circumstances. Things may look black against the accused but materials favourable to the accused may be found in the prosecution evidence. There may be strong legal points on his side. Lord Halsbury describes the contention that "an advocate is bound to convince himself by something like an original investigation that his client is in the right before he undertakes the duty of acting for him" as "ridiculous, impossible of performance, and calculated to lead to great injustice" (15 Law. Qr. Review, p. 265). Lord Herschell stys: "Many a wrong would go unredressed and many a man with just cause would suffer if the assistance of an advocate were never rendered until he was first assured that his client had the law on his side." "The general conclusion we have arrived at is

that almost always an advocate has not got the right to refuse to appear for a client who comes to him for assistance. There may be clients who may be so wicked and whose cases are so manifestly unjust that you may not be able conscientiously to appear for them. By 'conscientiously', I mean you may not be able to appear and to do justice to them and to conduct the cases in the manner in which they would like you to conduct it. In such cases I have no doubt it would be right to ask them to release you. But they may insist on your appearing ; and the proper course would be to warn them fully that in the conduct of the case you are your own master, that you will not say or do anything that you do not consider proper, and to refuse the engagement except on those terms" (Professional Ethics, pp. 208, 209).

A question that has been discussed on some occasions is whether in a criminal case an advocate can defend an acused who has confessed his guilt to him. This matter has been dealt with in a subsequent chapter (Ch. X *post*)

When any cause is undertaken, the advocate must do his utmost for the client. He must investigate the facts and the law to the best of his ability and discharge his duties without fear of favour. If the litigant whom he has to combat is a powerful or an influential person with ample resources or there is an array of distinguished advocates against him, it should be of no consequence to the advocate. He must pursue his client's case with vehemence and courage. Remember that the client has implicit confidence in you and in a sense his life and property are in your hands. This is to be specially borne in mind in India where the majority of the clients are illiterate without any comprehension of their rights. The

case may be weak, the advocate may even feel hesitation in accepting what the client said ; he must nevertheless perform his duties with unflinching devotion. As said before, his duty is not to place himself in the position of a judge, but put his client's case in the best possible light irrespective of his own belief. His knowledge of the case is founded entirely on the account given by the client. He may not have been able to tell his story in a convincing manner. His case may appear weak or incredulous, but the materials produced by the opposite party may improve his case. It may also be that his client's case is in all appearances a good one and he entertains no doubt as to its success. In any case, during the discharge of his duties as an advocate he should be particularly careful not to give expression to his personal opinion, to the Court, one way or the other, regarding the merits of the case. He should never allow anything to slip through his tongue which may lead the judge to infer what his personal views are as to the merits of the case he is arguing. He should repel all attempts by a Judge to ascertain his personal opinion as to the merits of the case entrusted to his care. The reasons are obvious. On this subject Sundara Aiyar says: "It equally behoves the advocate to bear this important fact in mind, and never to make a declaration of his own opinion as to the merits of the case he is pleading. I think this rule is equally applicable to questions of law. It would be unfair if an eminent advocate known to be a sound lawyer should attempt to gain an advantage for his client by stating that in his own opinion the client would be entitled to succeed, nor is it right, in any view of the question, for a judge to ask an advocate what his own opinion on the

matter he is arguing is. It would be proper if such an occasion should arise, for the advocate to decline to state his own view. Cockburn, C.J. found fault seriously with Sergeant Sheel for declaring that in his opinion his client Palmer who was charged with causing death by administering poison was not guilty" (Professional Ethics, pp. 38, 39).

In a case it was alleged that further evidence on a point was not given as the Court intimated that the evidence already recorded was sufficient. It was held that it is not right for a lawyer to take advice from the Court as to the kind or amount of evidence which has to be adduced in support of his client's case, and even if a Court goes out of the way and gratuitously gives such advice, which itself would be an extremely improper act on its part, counsel ought not to be guided by such advice, but must exercise his own independent judgment in deciding as to how to proceed in the conduct of the case (*Allah Ditta* v. *Mt. Bhagwan*, 1930 L. 401 : 116 I.C. 555).

"A somewhat serious question is discussed by another lawyer, whether an advocate may tell a lie while engaged in professional work. It looks a curious question to put, and the answer does not really clear up matter very much. The answer given is this: that when a witness is being examined an advocate may lie. That is to say, he might say "such and such other witness said so and so, what do you say to that?" It is stated that this is permissible because the object is only to press the witness and to see whether he would be prepared to repudiate it, so as to see whether he is really positive with respect to what he himself states. As far as I am aware this is not really

considered proper. But another method is sometimes adopted: "If so and so said so and so, would you be prepared to deny that. But my mind is clear that neither the first form nor the second is really proper. You have no right to confuse a witness, to disconcert him by saying that "if so and so said so and so, would it be right?" (Professional Ethics, pp. 77, 78). Is has been recently pointed out in a case that such questions are not permissible. In *R.* v. *Baldwin*, the Court of Criminal Appeal pointed out the undesirability of putting such questions as: "Is your evidence to be taken to suggest. . . . . ?" The function of a witness is to state facts within his knowledge, it is no more his function to review his own or anybody else's evidence than it is to comment upon the law applicable to the case (Law Journal, p. 216, Mar. 21, 1925).

It would not be right professionally to include in pleadings facts which the pleader knows personally to be false. I mean personal knowledge in the sense in which you understand in the law of evidence (Professional Ethics, pp. 114, 115). A lawyer cannot issue a notice which he knows to be false, although instructed by his client (*In re a High Court Vakil*, 6 M.L.T. 329). To enter into a false defence deliberately with intent to defraud others of their just claims is unprofessional conduct (*In re Akshay Narain Maiti*, 9 I.C. 362; see *In re J. N. Bose*, 5 C.W.N. 48). In a recent case the defence of the pleader was that he merely signed a document and it was drafted by a senior. The High Court observed: "This sort of defence has been put more than once, and we wish the profession to understand that a man who signs his name to a document makes himself thereby in every way

as responsible for it as if he was the original drafter of it. If it turns out that the document is one which no man acting honestly would in the circumstances have drafted, then he will be bound to answer every word, line, sentence and paragraph, and it will not be the least defence that somebody else wrote it out and he only signed it. Signature implies association and carries responsibility. . . Practitioners must realise that if they make, or associate themselves with, statements which they know to be dishonest and untruthful for misleading the Court, they must on proof of misconduct bear personal responsibility, and that it will be no defence for them to say that it was done in the interests of the client or at his instigation or at the instigation of a colleague at the Bar, or that they were so negligent in the matter that they did not read the document or consider it at all" (*In re Ahmad Ashrab*, 48 All. 542 F.B.: 1927 All. 45).

A legal practitioner must take scrupulous care not to conceal or distort facts in an affidavit in support of an appeal or revision (*In re W. S. Day*, 81 I.C. 973). A pleader filed a fresh application for bail before the district magistrate without informing him that a previous application for bail had been made to and dismissed by the Sessions Judge. Bail was allowed. It was held that failure to inform the magistrate about the fate of the earlier application for bail amounted to gross professional misconduct (*R.* v. *Jodh Singh*, 69 I.C. 442). To lodge on behalf of a client an obviously improper and groundless criminal complaint against a person is a serious misconduct (*In re a Vakil*, 47 All. 377) Sundara Aiyar says: "There should be no cunning pleadings, no scandalous statements in affidavits or in any pleadings that

you file ; and there should be no imputation on judges of lower Courts when you have to draft grounds of appeal. While you deal with the judgment of the lower Court or the grounds on which it is based, there ought to be nothing which is disrespectful to the Judge in the Court below. In an old case decided in 1603 Egerton, Lord Chancellor, punished insufficient demurrer by ordering that neither bill, answer nor demurrer should be received from a barrister of the name of Hill (Hill's Case, 1603, Cary, 27). It is not usual in these days to inflict so severe a punishment on pleaders who are guilty of this kind of conduct, and in the case of a judge who can command his own Court it would be unnecessary. The best course would be to refuse the pleadings, to admonish the pleader and point out to him the impropriety of his conduct. That would usually be quite enough, but I think Judges have sometimes been lax in checking improper and loose pleadings. It would be a proper thing on the part of the Judges in inferior Courts not to allow such pleadings to go unnoticed, but to return them" (Professional Ethics, pp. 113, 114). Under Or. 6, r. 16, the Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading which is scandalous.

As a general rule a lawyer is bound to take up a client's case when he is approached for his services and a proper fee is offered. He may decline to act if from the client's statement of the case the claim is clearly fraudulent or when he has personal knowledge of the dishonesty of the claim. The English rule is that "a barrister is under an obligation to accept a brief in the Courts in which he professes to practise at a proper professional fee, unless there are special circumstances which justify his

refusal to accept a particular brief. (Hals. Vol. II, para. 659, p. 393). There is a definite and well recognised rule that a lawyer must take up a case for any member of the public if: (1) A fair and proper fee is tendered to him. (2) Adequate instructions are given. (3) The case is of a class which the lawyer is accustomed to do. That is the general rule, but he may of course legitimately decline to take up the case if, for instance, he has an out-station engagement, or is engaged in some social function, such as a marriage or incapacitated by ill health or any reason which a sensible man would recognise as adequate. But to refuse to take up a case simply and solely on the ground that the advocate will not appeal against a brother practitioner, or to put forward untrue excuses when the real reason is a disinclination to appear against a brother practitioner, is, in each case professional misconduct and can and should be dealt with as such. The reason for the rule is obvious, and if lawyers as a body refuse to act against other lawyers, they would become a class standing above the law and justice would be denied to the public (*per* Mears, C. J., in *Mahomed Inayet* v. *Fazal-ul-rahman*, 1929 A. 367 ; see also *Ram Dulare* v. *Chhangamal*, 1930 A. 309). It is very important that men at the Bar should understand that they are members of a public profession. That is by their very calling they engage and undertake to act for any body who fulfils certain conditions. He has no right whatever to refuse a case if proper instructions are given and proper fees are tendered to him and the work is of a class which he is accustomed to do. Such refusal amounts to professional misconduct (*Gokul* v. *E.*, 1930 A. 262). In a case in which the allegation was that all the lawyers had refused to take up a case against

another lawyer, it was suggested that the result of requiring lawyers to do their public duty may be that a lawyer may accept the case and will deliberately refrain from putting up a good fight. Mears, C. J. said, that "if on enquiry it comes to light that a lawyer deliberately refrained from doing his duty, one step alone must be taken and that is, to remove him from the profession which he has so manifestly disgraced by his conduct" (*Ram Dulare* v. *Chhangamal,* 1930 A. 309).

If an advocate is approached for an engagement, it is his duty to disclose to the client any interest that he may have in the matter or the fact of a previous consultation by the opponent, if any. He may have previously given an opinion to the other side which is opposite to the opinion offered now or obtained from the opponent confidential information which may be used against him with advantage. It is not a pleasant sight to see an advocate attacking his own opinion given formerly nor does it enhance his reputation. In *Williams* v. *Reed,* 3 Mason (U.S.) 405, 418 Story, J., said "He is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. No man can be supposed to be indifferent to the knowledge of facts, which work directly on his interests, or bear on the freedom of his choice of counsel. When a client employs an attorney, he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him ; that he has no interest which may betray his judgment, or endanger his fidelity". If a client after consulting an advocate or taking his opinion does not wish to engage him, the advocate may

take up the other side. "He ought not to accept a retainer or brief from the other side without giving the party for whom he has drawn pleadings, or whom he has advised, or on whose behalf he has accepted a brief, the opportunity of delivering a brief to him." (Hals. Vol. II, para. 679). But if confidential matters have been communicated to him during the consultation, he cannot disclose or make use of them to the detriment of the party who first approached him. He can use them only if he gets that information from the party who engages him subsequently, or from his papers. If he feels embarassed in the discharge of his duties on account of such confidential communication, he ought not to work for the opposite party. In a case it was held that counsel ought not to accept a brief in any case in which he would be embarassed in the discharge of his duty by reason of confidence reposed in him by the other party. (Hals. Vol. II, p. 407 refd. to). The matter seems to be left to the good feeling of the advocate, but presumably if it was one where the advocate's embarrassment was self-evident, and his action an obvious scandal, it would be brought before the General Council of the Bar (*Vedavalli Ammal* v. *Ganapathy Iyer,* 1930 M. 626). There are however dishonest clients who offer a small retainer to an advocate with the sole object of preventing his engagement by his opponent and do not employ him afterwards. This is certainly very mischievous tactics. But there is no harm if in such a case the advocate who is thus attempted to be gagged, takes up the case of the other side provided nothing confidential or important was communicated to him and he does not use such information against the first party. If such an unscrupulous client were allowed to take advantage of his

conduct which is nothing but fraudulent, advocates would be greatly handicapped and best legal help would be shut out to the other party as the result of mean artifice.

The following rules apply to retainer:—"A retainer is the engagement of a barrister to give his services to a client, and involve the payment of a fee, without which there can be no retainer.

(1) A barrister must not exercise any discretion in the selection of the suitor for whom he pleads in the Court in which he practises.

(2) A barrister is bound to act for the party by whom he is retained, as long as his services are required, and no longer.

(3) A barrister ought not to accept a brief against a former client, even if the client refuses to retain him, if the barrister by reason of his former engagement knows of anything which may be prejudicial to the client in the later litigation." (Hals. Vol. II, para. 675).

A pleader exclusively retained by a company accepting brief against that client in another suit by opponent, is guilty of professional misconduct (*A, a pleader* v. *Judge of Allahabad High Court,* 1928 P.C. 60.)

A legal practitioner cannot work for both sides—He cannot represent conflicting interests or undertake the discharge of inconsistent duties. A lawyer who was appearing for the prosecution, prepared a draft of a written statement for the accused. It was held to constitute unprofessional conduct. Of all species of disloyalty, desertion or adherence to the enemy or opposite party, is the worst (*E.* v. *Rajani,* 37 C.L.J. 487). The conduct of a pleader in acting for both sides is grossly unprofessional conduct (*In re Birkishore,* 3 P.L.J. 390).

When making submissions, the language adopted must be measured and polite. The advocate should try to convince the judge and to bring him round to his point of view by cogent reasons and gentle pursuasion without assertions or declamations. In his eagerness to get an order in his client's favour, no appeal should be made to the sentiment of the judge, nor should there be any lamentation that any other order should work great injustice. That would be an anticipatory criticism of the judge's ruling bordering on contempt. An advocate is entitled to use all arguments that he can command in order to get a decision in his favour, but to say that a ruling against his contention would cause injustice or great hardship is to cross the border line. Justice of a case is not on one side and when a Court passes an order, it is because he thinks that the justice of the matter requires it. It is his privilege to decide and pronounce what would be the proper order to meet the ends of justice. Sundara Aiyar expresses himself thus on the point: "Sometimes we find in our experience advocates not understanding the gravity of the matter, and telling the Court that unless they uphold their contention they would be doing an injustice. This really would be contempt. It would be going too far on the part of an advocate to say that a decision contrary to that required by him would be unjust. It is for the judge to decide what the justice of the cause is, and no advocate has a right to say that only one decision could be just when he is arguing a case. Of course, the limit to which the advocate might proceed in asseverating the justice of his cause is often very thin. It may be right enough to say that the justice of the case requires a certain thing to be done, but you should

not say that if the court pronounced judgment in a certain other way, that would be unjust, because when he does pronounce it, it must be because it is just". (Professional Ethics, pp. 96, 97).

It is needless to say that wishing and rising from seat when the Judge enters or leaves the Court are but agelong courtsies which are shown everywhere. But the following lines are interesting reading: "We find in 34 American Law Review p. 237 a passage which, we here, would consider as very curious, namely, an exhortation to the bar that its members should rise when the judge comes to the court. It seems there are courts there where advocates pose in all sorts of ways, when the judge comes, sitting in all kinds of postures, doing anything they please, and, (I believe the writer says), some of them even picking teeth. However, there is no necessity for a such advice in this country. It is well, however, to remember that these are not mere rules of courtsey which it is proper that you should observe ; a breach of these observances would be actual contempt of court and punishable as such." (Professional Ethics, pp. 98, 99).

Comment on a pending case whether in and out of court is improper and should be always avoided. "Sometimes one may feel strongly with respect to a case in which one is engaged. To avoid the temptation of stating what is improper, the best rule is not to comment on the case outside the court room. When you have done with the arguments in court, let there be no more about it. I need hardly warn you that it is not only improper, but a contempt of court on the part of an advocate to comment upon a pending case in any newspaper. . . . . Of course, every advocate has a right to criticise judgments that have

been passed, but in the interests of his own peace of mind and in order that he may not be tempted to act improperly, the best course would be to have nothing to do with the case for six weeks after it has been decided". (Professional Ethics, pp. 109, 110).

It need hardly be said that while in Court, expression of opinion on any act or ruling of a Judge—whether it be approbation or disapprobation—is very improper and amounts to contempt of Court. So, to say that a particular order passed would work injustice or hardship on a client or to express gratitude saying that, a right decision has been given is equally improper.

Some clients exhibit an anxiety to engage more advocates than one on their side and sometimes this is resented by the advocate who has charge of the case. He may think that his client doubts his competency or cannot trust him fully. Two heads are better than one and an advocate may miss a point which may suggest to another. Besides, the assistance of another lawyer will generally come as a relief to the busy advocate whose engagements are many. It should always be remembered that litigants get nervous about their cases and it is not unnatural for them to think that the services of two or more lawyers will strengthen their position. But when one advocate feels that the desire to engage another lawyer springs from want of confidence in him, he should give up the case and allow full liberty to the client to engage any one whom he prefers. But if the desire not to associate with another lawyer is founded on some dislike for the other, his conduct becomes improper. Whatever vices an advocate may have as a private gentleman, all advocates are equal at the Bar and private feelings should

not stand in the way of working in conjunction with any other member of the profession.

A lawyer may sometimes feel embarassed by the offer of brief by both sides. "Difficulties of that kind do sometimes occur in this country also, because, naturally, clients would be eager to secure the services of the most competent counsel. It is not much use to draw your attention to the elaborate code in England which has been framed by the profession itself for this purpose. But generally, I may tell you the rule is "first come first served." The counsel is bound to take up the case of him that goes to him first. This, of course, does not mean that he has absolutely no choice. It may be that one of the litigants is his own friend. He may then have a choice in the matter, though it is doubtful whether in England he really has it." (Professional Ethics, p. 214).

"Advocates do feel bound in honour to accept the engagement which is first offered to them. But it must be confessed that this duty is often evaded. A client is put off on some ground or other and the chance of the other side turning up awaited". (Professional Ethics, p. 234).

It is not infrequently found, specially in the mofussil that the preliminary stages of a suit are kept in the hands of a junior lawyer, and on the day of a trial the services of one or more senior advocates are engaged. Naturally the choice of a senior is left to the junior who has been in charge of the suit from the time of its institution. But the etiquette of the profession is not to name or recommend another advocate as his leader. The same rule prevails when it is necessary to engage a junior. A senior ought not to recommend a particular lawyer as his junior. That

would be showing partiality to a particular junior while his duty is to treat all juniors with equal consideration. Every one should be given equal chances of an engagement and undue preference should not be shown to any particular senior or junior. The matter may best be left to the client so that he might pick out the lawyer who will serve his purpose best. As a matter of fact this seldom happens, as the client generally wishes to have the man who is liked best by the junior as his senior or the senior as his junior, so that the two might get on well together. Inspite of the well meant and high rules of professional etiquette, it is very frequently seen that seniors do try their best to push up particular juniors and *vice versa*. Sundara Aiyar says: "Sometimes in this country a client presses the senior to name a proper junior and professes his own inability to make the selection himself. In such cases I would hardly go the length of saying that the senior should decline to suggest any names. But, for myself, I would say that the proper course would be to name a number of names and leave the client to select out of them. (Prof. Ethics, p. 324). When a senior is engaged in a case which is in the hands of junior, the latter should not settle with his client the fees that the senior should get. It is best to leave the matter to be settled by the client and the senior, as the senior may think that he would have got more if the junior had not intervened.

Sometimes the question arises whether a senior is bound to accept a brief given to him by a junior. On this point Sundara Aiyar says: "The ordinary etiquette is that he is, and that he is bound to give preference to the junior who goes to him first. I cannot say that is the rule accepted by all, but I believe that that is the best

opinion, that is the opinion of those whose character stands highest. But the question may arise—is a senior bound to take up every rotten case which might have been launched by a junior vakil. I should be inclined to think that if the senior thinks the case is worthless and that he will be unable to be of any help to the litigant, undoubtedly it is his duty to say so. And it may be that, where he feels he could do nothing at all, he would be justified in refusing to take the brief" (Professional Ethics, p. 215).

If more than one lawyers are engaged on one side and all are present, the senior has the conduct of the case and it is he who has the right of audience. If for some reason or other, he desires to put the conduct of the case into the hands of a junior, he should intimate accordingly and get the leave of the judge. Once he waives his right in favour of the junior, he cannot resume his former position without leave of the Court. If possible, it is far better that one lawyer should work throughout, during the trial stage. At any rate, if to one lawyer is assigned the duty of examining witnesses and to another of arguing, the latter should be present during the examination of witnesses and watch the proceedings. A lawyer who did not hear the evidence and was not present when the other evidence was tendered, is bound to feel embarassed when called upon to argue the case. He may leave many things unsaid as he did not hear the evidence himself. In big cases spread over days, the matter may be rectified by furnishing him with copies of depositions, but in cases which do not take up much time and arguments have to be made then and there, his absence from Court during

the trial stage, does not enable him to do full justice to the case.

When a lawyer has taken up an engagement and begun a case he cannot abandon it for any reason. It is then not merely a duty to his client but a duty to the Court as well. He cannot obstruct the course of justice by deserting his client in the midst of a trial. Even a plea that he has not been fully paid would be of no avail. If the fee has not been paid, he may sue for it, but once he begins a case he must act throughout. The rule is stricter in criminal cases. Apart from bringing the work of the Court to a standstill, irreparable injury may be inflicted, if an advocate who was defending an accused on a serious charge and who was in full possession of facts abandoned him in the midst of the trial. When the plaintiff was being examined in chief, a pleader left the Court and his explanation was that he went to attend another case in another court. It was held that the pleader in abandoning his client's case acted improperly and after he had once begun the case, he ought to have worked for him till the end. He was found guilty of unprofessional conduct and suspended for a month (*In re Benimadhab Das,* 20 I.C. 139 Cal.). In a murder case the appellants paid a barrister Rs. 1,000 for arguing their case, but he took up an engagement elsewhere and sent another barrister to argue the appeal paying him the miserable sum of Rs. 32. The appellants complained to the Court and did not want them to be defended by the substitute sent. The explanation of the barrister was that the Government had engaged him to appear in a case elsewhere. He was suspended for a month. It was held that in a murder case it is not

competent to a counsel who has received a fee from his client for arguing the case to hand over the case to another counsel at the eleventh hour giving him a negligible portion of the fee simply because he is engaged elsewhere. If he has reason to believe that he would not be available when the case would be called on for hearing, it is his duty to communicate with his client and to return the fee to him. If it is not possible for him to do so, and the pressure of overriding circumstances is beyond his control, then he should try his very best and spend the whole of the fee in briefing a counsel who would do full justice to his client's case for the remuneration. If he finds some friend who is prepared to do his client's case without any consideration, then he must see to it, that he is a counsel who would be able to conduct the case with as much thoroughness and industry as any other counsel would do on the receipt of the whole fee (*In re Byrne*, 1928, Lah. 448 : 108 I.C. 257). Counsel assigned for the defence of an accused charged with murder cannot decline the office, nor can be abate a jot of his duty to the accused and to the Court, because of the querrelous attitude taken by another counsel who is asked to associate himself with the counsel assigned to the accused (*Kazi Bazlur* v. *E.*, 1929 C. 1).

If after promising to act for a client and accepting a fee it is not possible to appear at the trial for pressure of overriding circumstances, he can appoint a proper substitute and settle the latter's fee with him. But if the client in such a case does not want the substitute to appear and prefers to select his own advocate, the lawyer should refund the fee which was paid for his services. One legal pactitioner cannot transfer his client's case to

another without the client's consent (*Maung Kyan* v. *Maung Po*, 8 I.C. 958). It is an etiquette of the profession to help each other in case of emergency and particularly in cases of sickness. If an advocate has a few words to say in connection with a case or if he has to examine his witness in an *ex parte* case and he cannot come on account of a pressing engagement elsewhere, it is the etiquette to send a brother advocate to represent him who explains the circumstances to the Court and begs leave to act for him.

A pleader *N* had two cases to attend to on the same day. In one he was assistant to a senior, but in the other he was solely responsible though *B* a relation pleader of his was also engaged on nominal fees to take notes of evidence. On the previous night *N* took detailed instruction from his client who was being prosecuted for bribery in the latter case. His relation *B* was also present, but the client remained under the impression that *N* would conduct the cross-examination the next day. On the next day, however, *N* presented himself in the former case the client concerned wherein was important and did not attend the bribery case though requested. The former case was conducted by his senior who was amply provided with assistance independently of *N*. The bribery case was weak, and it was then conducted by another pleader and the accused was convicted. Held that *N* threw away the interests of an unimportant client in favour of the interests of an important client and in so doing was guilty of unprofessional conduct (*In the matter of N a pleader*, 1929 Pat. 153 F.B.

"Suppose there are two advocates engaged in a case. It is often the fact that an advocate in unable to appear

owing to conflict of work. If a client has engaged two, one can hardly say that he is entitled to the actual presence of both at the hearing when one of them has a conflict of engagements. He is certainly entitled to the services of both, but those services do not consist necessarily in actual argument in Court. Both are bound to give the benefit of their counsel. Both, of course, cannot ordinarily argue in Court, and I do not think that the client is entitled to say that a particular one amongst the advocates whom he has engaged should argue. The matter is for arrangement between the advocates themselves. If, for instance, the senior advocate in a case thinks that the case is likely to profit by the advocacy of the junior, he has the right to put the conduct of the case into his hands, and if he happens to be engaged elsewhere he has the right, after giving the benefit of his counsel to the junior advocate, to ask him to address the Court. But clients do not always take the same view. They attribute, it may be, undue importance to the actual appearance in Court of a particular advocate. They consider themselves injured if he is not able to satisfy their desire. We may say they naturally feel injured ; but while one cannot blame them, it is not possible to lay down the rule that they are entitled to the return of the fee which they do often demand. In England counsel often are unable to satisfy their engagements. But according to the etiquette it is open to a client to purchase a counsel's actual appearance by agreeing to pay a special fee. By mere engagement according to the ordinary form, he does not get an absolute right to his services. But such absolute right may be secured

by a special contract, which means also special remuneration." (Professional Ethics, pp. 261, 262, 263).

When a client has engaged two or more advocates and the senior among them or the one who was to conduct the case, cannot appear on account of some engagement elsewhere, one among the other advocates present in Court must be prepared to go on with the case. The Court may insist on the case being conducted by one the advocates present. A junior must therefore study the case with thoroughness and come prepared to act in an emergency. He must not rely too much on the senior thinking that he has no important part to play. His preparation of the case must be such that the client can have no occasion for complaint and he can take up the place of the senior if he cannot for any reason appear. He must study the case and prepare as if he has to conduct and argue it without the help of anyone. Nor can he profit by his engagement and acquire courage if he thinks that he has not much responsibility in the matter and his duty does not extend beyond taking notes for the senior or looking up precedents. It is a mistake to think that he should not be required to argue the case and he need not therefore prepare himself thoroughly. Very often juniors are taken unawares and exhibit considerable hesitation and nervousness coupled with unpreparedness when they are faced with the duty of conducting a case in the absence of their senior. They can rest assured that the Court will render them all possible help and be even indulgent. Failure to act in such a situation with ease and determination creates an unfavourable impression and may affect his future career. There are however a few juniors who feel happy when such an

opportunity occurs and take fully advantage of the occasion for the display of their talents. They are men who come fully prepared and have no dread of responsibility. As said before, if the senior is absent and the Court cannot pass the case over, the junior should be prepared to conduct it when called upon to do so. When the client has engaged two advocates, it may be taken that he has equal confidence in both. No doubt the client naturally desires that he should be represented by the senior advocate or the advocate in whom he has most confidence, but in matters like these it is for that advocate and his client to settle the matter. Fairness and honesty require that if he cannot appear for some unavoidable reason he should give timely information to the client or arrange for another advocate who will be able to do full justice to the case.

A lawyer cannot while a case is going on, leave the Court without any one to look after the case, without the permission of the Judge. Even if there be another lawyer engaged with him, who is present, an advocate who is conducting a case cannot go out of court without placing him in charge with the leave of the Court. The obligation to remain and attend continues even when he has finished his argument and the opponent's advocate has begun the address. He has to listen to the argument of the other side, so that he can hear how his points have been met with and supplement his own argument by fresh argument, if necessary. He has also to check misrepresentation or inaccurate statements by his opponent or to offer explanations on certain points when called upon by the Court. A case does not terminate till the arguments of both sides have been heard.

Transactions between lawyers and clients are watched

by the Courts with considerable jealousy on account of the existence of fiduciary relation and active confidence. Lawyers must be very careful in these matters as any interest acquired or advantage gained, leads to the presumption of undue influence. The onus is on the advocate to show the good faith and the fairness of the transaction (see s. 111 Evidence Act). In the absence of competent independent advice, a transaction between persons in the relationship of solicitor and client, or in a confidential relationship of a similar character, cannot be upheld, unless the person claiming to enforce the contract can prove affirmatively that the person standing in such confidential position has disclosed all information in his possession and further show that the transaction itself was fair (*Demerara B. Co.* v. *Louisa Hubbard*, 1923, A.C. 673. P.C.). A lawyer cannot purchase in court-sale a property of his client in respect of which he has acted in a professional capacity (see *Nagendrabala* v. *Debendra*, 22 C. W.N 491). He is regarded as a trustee for his client if such purchase is made. S. 136 of the T. P. Act says that no legal practitioner shall buy or traffic in, or stipulate for, or agree to receive any share of, or interest in, any actionable claim. Purchase of an actionable claim prohibited by s. 136 T. P. Act is unprofessional conduct (*Muni Reddi* v. *Venkata Row*, 37 Mad. 238).

It need hardly be said that an advocate should keep clear and accurate accounts of all moneys received from and on behalf of his client. On no account should the client's money be mixed up with his own fund. Vouchers should be retained for all amounts spent on behalf of a client and proper receipts should be taken when making over his money to him. If there are more cases than

one, a separate account should be kept for each case. A lawyer receiving his client's money should remit it to him at the earliest opportunity, unless the client wants him to retain it for some purpose. Remunerations for professional work should not be deducted from moneys received on behalf of a client, without his consent. A pleader has no lien on his client's money (4 I.C. 398 ; 15 C.W.N. 681 ; 4 A.L.J. 535). He has a lien on his client's papers and on the fruits of litigation for his fees and remuneration (44 Mad. 978). With regard to papers and documents, they should be returned to the client no sooner than the case terminates. This should be specially borne in mind as clients here seldom come for their papers before they feel their necessity a second time. Steps should be taken to part with the papers even if the clients do not come for them. Neglect in this matter involves the taking of unnecessary risks.

Whether it is a matter connected with the case or with the disbursement of the client's money, an advocate should do the work personally. The responsibility is entirely his. Such things should not be left wholly to his clerk whose work must be carefully supervised. It is the advocate who is the representative of the client and not his clerk. Clerks are employed by lawyers for assisting them in their clerical and other duties on their own responsibility. The lawyers are responsible for all defaults by cleks or their negligence. Whenever there is any default or omission in the pleadings or a failure to take any step which was necessary for the progress of a suit, or there is misappropriation of money which the client made over for expenditure on a certain item, an attempt is sometimes made to shirk all responsibility by

throwing the whole blame on the clerk. This subterfuge is of no help and the lawyer is liable for loss suffered on account of the negligence of his clerk. Sundara Aiyar says: "In the first place, a vakil is, of course, responsible for all defaults of his clerks, and if I may judge from my experience, it is by no means an unnecessary advice to say that you should be careful in supervising the work of the clerks. But besides that it is not proper that a vakil should allow a clerk or another vakil, it may be a junior assistant, to dispose of the work of his client. Every client pays for the work of a particular brain and while we cannot overlook the necessity of getting the help of both clerks and assistants, it would be extremely improper, if the work is delegated to him in such a manner that the attention of the person whose services are engaged is not personally bestowed on it" (Professional Ethics, p. 304). It cannot be too constantly or too emphatically stated that if a lawyer leaves his money business to be conducted by his clerk, he is responsible for what the clerk does for purposes of civil liability. At the same time if the lawyer is deceived by his clerk, or if the clerk does acts in fraud of him, then of course it would not be right to hold that the lawyer is himself guilty of professional misconduct (*In re a Vakil*, 1928 Cal. 817 F.B.). An advocate was suspended from practice for failing to file an appeal within the period of limitation. His defence that it was due to the negligence, trickery and lies of his clerk was not accepted (*In re S.*, 1928 Cal. 820 F.B.).

Pleaders cannot carry on any other trade or business without the permission of the High Court. A pleader engaging himself in trade without intimating the fact to

the High Court is guilty of misconduct (*Muni Reddi* v. *Venkata Row*, 37 Mad. 238). It is improper for a legal practitioner to have money-lending business in the name of his minor son (21 M.L.J. 559). For vakils entering into trade, see *Ram Sarup* v. *Tika Ram*, 42 All. 125 F.B.

It is professional misconduct to employ persons for procuring legal business by offering them remuneration. "'Tout" means a person (*a*) who procures, in consideration of any remuneration moving from any legal practitioner, the employment of the legal practitioner in any legal business ; or who proposes to any legal practitioner or to any person interested in any legal business to procure, in consideration of any remuneration moving from either of them, the employment of the legal practitioner in such business ; or (*b*) who for the purposes of such procurement frequents the precincts of civil or criminal Courts or of revenue offices, or railway stations, landing stages, lodging places or other places of public resort (S. 3 L. P. Act). A lawyer who tenders, gives or consents to the retention, out of any fee paid or payable to him for his services, of any gratification for procuring or having procured the employment in any legal business of himself or any other pleader or mukhtar, commits an offence punishable under s. 13 of the L. P. Act. A pleader who pays a sum of money to a procurer of clients or allows him his clerk's *munshiana* as a gratification for having procured a client is guilty of unprofessional conduct (22 P.W.R. 1910 Cr.). It may be presumed that a man is a tout if it is shown that he spends the greater part of his working hours in canvassing and procuring the clients to members of the profession (*Kalka* v. *E.*, 40 All. 153). The Indian Bar Committee (1923-1924) said: "The evidence which

we have received leaves no doubt that touting of various kinds prevails in most parts of India. The plain fact is that unless the legal profession assists the Courts to suppress touts little can be done by way of legislation."

The profession of the advocate is quite different from the profession of tradesmen. It is a learned profession consisting of men of culture and legal education. Its code of ethics is very high and lawyers have to adhere to a high standard of morality and conduct. Tradesmen are allowed to advertise their goods and solicit custom and they do often engage themselves in rate war. Lawyers on the other hand ought not to seek patronage or to solicit business. The rule is very strict in England and barristers cannot advertise themselves. It is not professional for barristers to furnish signed photographs of themselves for publication in legal newspapers. Frequent visits by barristers to attorneys or undue familiarity with them is even condemned. There, the functions of the barristers and attorneys are different. In India, in the mofussil, the office of the attorney and pleader are combined in the same person. The profession always demands a high standard of morality and conduct and there should not be any solicitation for work. In *Govt. Pleader* v. *S. A., Pleader,* 1929 B. 335: 31 Bom. L.R. 625, Marten C. J., said: "As regards advertising, there is no doubt that that is unprofessional conduct on the part of a professional man such as a pleader or an advocate or a barrister. This indeed is a leading distinction between professional men on the one hand and those engaged in trade or business on the other hand, and it is of importance that that distinction should be maintained." It was therefore held that

a pleader's sending a circular post card merely giving the address and the name and description of himself would amount to advertisement on his part and therefore to improper conduct. (1929 Bom. 335 *ante*). Unfortunately however, overcrowding in the profession leads to scramble for work and it is well known that there is a good deal of touting and other abuses. Excessive competition results in the lowering of professional ethics and the adoption of questionable methods. This is true of all countries and professions. The American Bar has a very elaborate and excellent code of professional ethics, but grave abuses exist there also. This is what Stalland writes in an article entitled 'I want to be a lawyer' published in a recent number of Minnesotu Law Review (Vol. XIV, p. 441):—

"The out and out ambulance chaser does that; he chases ambulances and solicits law suits. He has hirelings who are police officers, drivers, switchmen, even nurses and internes. These hirelings work on a percentage basis or on a straight salary and their duty, of course, is to report an accident, in which someone is injured, as quickly as possible to the office of the lawyer. Then either the lawyer himself or an assistant hurries to the bedside of the patient and there by exhibiting a portfolio of purported newspaper clippings of large verdicts obtained by this attorney in accident cases, he makes the patient believe that after all his broken leg or cracked skull was a good stroke of fortune. Then the ambulance chaser places before the patient a contract employing his services in obtaining a settlement for the injuries sustained wherein it is stipulated that the lawyer is to receive as his fee thirty-three and one-third per cent to fifty per cent. of the recovery. These contracts are often signed within an hour or two after the accident and while the patient is in great pain if not partly out of his head. I asked one of these ambulance chasers once how he justified proceedings like this. He answered that he was performing a good work in obtaining money for the

unfortunate who was maimed. But as a matter of fact, that is only part of the truth because in many cases neither the unfortunate victim nor the alleged wrong-doer or his insurer gets a square deal. The chaser has little regard for the other fellow. Whether the defendant was actually liable for the accident, matters little to him. He is out after the money. He makes use of all the legal threats known to force a settlement. He even manufactures evidence, if necessary, to weave the web of liability about the defendant. If possible, he makes life so miserable for the alleged negligent one that he forces a settlement no matter how unjust. He knows the average person hates trouble, law suits, or publicity of this kind and often pays an unjust claim rather than run the hazard of jury verdict and the inevitable legal expense. A law suit generally costs money whether you are right or wrong, whether you win or lose; an even Insurance Company will often settle, regardless of facts, for what they term the "nuisance value" of a law suit, that is, the cost of trying a case in Court."

An objectionable mode of solicitation or advertisement is giving publicity to the fact that an advocate is the favourite of a particular judge or that he commands his special confidence. Nothing can be more reprehensible than such conduct. A mere glorification by a lawyer of himself and his professional powers may not constitute an offence, but to suggest that he is in a position to influence the judge is unprofessional conduct (*In re a High Court Vakil*, 26 M.L.J. 429). Sundara Aiyar says: "Care is to be taken by an advocate that he does not pretend to be able to command the confidence of the judge. No advocate should tell his client that a particular judge has a special confidence in him or that his arguments generally produce a good impression on any particular judge. Instances are unfortunately not wanting of counsel having yielded to the temptation of saying to clients that a judge hearing

motions has a good opinion of him." (Professional Ethics, p. 315).

It is improper to name any lawyer if any advocate is approached by his client for nominating one who is likely to find favour with the judge. "A barrister was asked by a client 'who was the *persona grata* of a particular judge'? The client wanted to engage a pleader who was likely to be viewed with most favour, as he thought, by a particular judge. The barrister wanted to know whether it would be proper to answer it, and the Bar Council decided that it would be improper. You can easily see that the answer was perfectly sound. You have no right to produce any impression that a judge is not absolutely impartial by suggesting that justice would be more easily had, if one particular counsel appeared instead of others. I should hardly tell you that the temptation should never be yielded to of stating to clients that a particular judge is well known to you, or that a particular judge thinks well of you, in order that the client may be induced to give you his case. This is a kind of temptation that is sometimes yielded to even by honourable advocates. But there can be no doubt about the impropriety of any such statements". (Professional Ethics, pp. 110, 111). There can be no question that if an advocate tells any such thing to a client or circulates it through his agents for the purpose of securing clients, it is highly improper. An advocate should never pretend to be in a position to command the confidence of a judge, nor should he tell that he is intimate with him. It is matter of common knowledge that whether or not there is propaganda of this kind by an advocate, it is generally believed by the client world that so and so is the favourite of a particular judge. Such impressions are

generally founded on the fact that advocates who are courteous and have an unruffled temper are always treated with consideration and given a patient hearing; while cantankerous and blustering advocates do not get on smoothly with the Judge. It can not be believed for a moment by any reasonable man that a Judge is prepared to decide a matter affecting the merits of a case in a particular way, simply because an advocate who is liked by him is engaged on one side.

There are no hard and fast rules regarding the fees that may be taken for professional work. The question is to be settled among the parties by contract. Formerly, no suit in respect of an agreement entered into by a pleader with his client regarding his fees could be brought unless it was in writing and filed in Court within a fixed period. But s. 28 of the L. P. Act as also ss. 26 and 27 have been repealed by Act XXI of 1926 (Legal Practitioners Fees Act). By s. 3 of this Act a legal practitioner may settle with his client the terms of his engagement and the fees to be paid for his professional services and under s. 4 he may sue for such fees. So a pleader is free to enter any agreement that he considers proper. If there is no specific contract as to fees, a lawyer is entitled to a *quantum meruit*, i.e., fair remuneration for work done and he can sue for it. Although it is open to a lawyer to value the worth of his own services and to demand any fee he likes, it should not be excessive or oppressive. In ancient times the service rendered by an advocate was considered as an office of kindness or honour. It was rendering help to one who was not in a position to plead his own cause. So, the fee paid to a barrister, is known as honourarium, as opposed to *merces*, for it was considered obnoxious to offer

such service for money. The employment being purely honorary, a barrister cannot to this day sue for his fees. On the same principle the client is also prevented from suing the barrister. Being a noble profession, the fee charged should not be unduly high, and it should be remembered that indigent persons have as much need of lawyers as rich men. Men who have risen in the profession and whose reputation has been established are often tempted to take full advantage of their position, as they know that clients will vie with each other in engaging their services, irrespective of their pecuniary circumstances. It ill behoves a member of an honourable profession to be a party to such exploitation. Sometimes clients are diposed to pay a fee far disproportionate to the services to be rendered simply for enlisting the services of a certain individual on their side. Sometimes they are bent upon having one or more of such lawyers on their side not only with a desire to have the advantage of their services, but also to prevent their opponents from engaging them. Rule 54 of the American Bar Association says: "Men, as a rule, over estimate rather than under value the worth of their services, and attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and services, as well those which practically belittle them. A client's ability to pay can never justify a charge for more than the service is worth ; though his poverty may require a less charge in many instances, and sometimes none at all." The very exorbitant fees demanded by some members of the profession have sometimes been adversely commented upon by both Judges and the public. Under-selling in profession lowers its prestige. No one would deny that times are very hard and there is indecent scram-

bling for work everywhere. There is a great temptation to accept briefs at almost any fee. But "rate cutting" in the legal profession is bound to make things worse and to lower it in the estimation of the public. There is of course no objection to acceptance of a nominal fee or a reduced fee from an indigent person who is unable to pay more.

A lawyer has sometimes to act as *amicus curiae* without any remuneration. When there is any matter of law in regard to which the Court is doubtful or mistaken, or when there are circumstances in which the Court thinks that assistance should be sought, it appoints an advocate as *amicus curiae* (friend of court).

Perhaps no privilege is more abused than the right of cross-examination to credit. Witnesses are wantonly disgraced and bullied by asking offensive questions under the guise of cross-examination to credit. In England the abuse became a scandal and was the subject of much comment by eminent judges. The limits of cross-examination as to credit will be discussed in the chapter on cross-examination (*post* Ch. XVI and also p. 128 *et seq.*). The affairs of persons other than the parties are sometimes brought up in the midst of a case and the advocate must be particularly careful not to injure the reputation of those who are not before the Court to defend themselves. It would be improper to cast aspersions on the character of third persons while discharging his duties to the client. He has duties towards other persons and the public as well. "It is not his privilege, and it is not proper on his part, to shatter the reputation of others in order to protect his own client. Criticism justified by what has been adduced in evidence against witnesses he may offer, but nothing can be more

dangerous than to imagine that, because he is placed in the vantage ground of an advocate, everyman's reputation is in his hands to do what he likes with, so long as he is engaged to defend another" (Professional Ethics, p. 212).

There are certain privileges which advocates enjoy while discharging their professional duties. Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has jurisdiction, the lawyers are exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal. (See s. 135 C. P. Code).

In England the expression of counsel uttered in his professional capacity with reference and in the course of a judicial inquiry are absolutely privileged, and no action will lie in respect of them. (Hals. Vol. II, para, 641). In an old case in India it was held that an advocate cannot be proceeded against either civilly or criminally for words uttered in his office as advocate (*Sullivan* v. *Norton*, 10 Mad. 28 F.B.). This ruling was followed in *Anwaruddin* v. *Fathim*, 1927 Mad. 379 : 100 I.C. 537 by reason of the special circumstances of the case. But this doctrine of absolute privilege has not been upheld in other cases. It has been held by a Special Bench of the Calcutta High Court that the common law doctrine of absolute privilege does not apply to the law of defamation in s. 499 I. P. Code (*Satis* v. *Ramdayal*, 48 Cal. 38j : 24 C.W.N. 982). The same view has been taken in Rangoon, (see *Mc Donnell* v. *R.*, 3 Ran. 524 : 92 I.C. 737). The application to the criminal law in India of the English common law doctrine

of absolute privilege was also doubted in *Tiruvengada* v. *Tripurasundari*, 49 Mad. 728 F.B. Advocates in India did not enjoy such unqualified privilege in respect of questions put to a witness in cross-examination as advocates in England. Good faith is to presumed. But while counsel has privileges, they had their responsibilities too and they ought not to abuse their position (*Bannerji* v. *R.*, 46 C.L.J. 227 : 104 I.C. 717). If a pleader puts defamatory statements in utter recklessness and without seeing whether there is any truth, with a view to injure the reputation of a witness publicly, he acts in bad faith and there is no privilege (*Fakir* v. *Kripasindhu*, 54 Cal. 137 : 101 I.C. 600).

Junior members of the profession should be treated with kindness and consideration. Courtsey to all is an indispensable requisite of a good advocate. Snappishness irritates the judge, annoys the client, hurts the opponent and makes the advocate notorious. It is not unoften that a senior member of the profession attempts to domineer over his opponent and treats him with scant courtsey. Such conduct degrades an advocate in the eyes of the Judge and the public and evokes sympathy for the junior. "It is impossible the cause can go on, unless the gentlemen at the bar will a little understand one another, and by mutual forbearance, assist one another"—per Eyre, L. C. J. in *Hary's case* (1794) 24 How. St. Tr. 688. The bar is a democratic institution and the members whatever their standing may be are entitled to equal treatment and same privilege. A junior appearing as his opponent is entitled to be treated by the senior with the consideration and deference due to an advocate of equal standing Fraternity in the bar levels down all in-

equalities and rounds off angularities. "In argument at the bar all counsel are equal, and no senior should demand excessive respect from a junior who is opposed to him. It is the duty of an advocate to do the best for his client, and no feeling of consideration for the opposing counsel should stand in the way, because he happens to be a particular learned gentleman or one of very long standing." (Professional Ethics, pp. 337, 338). "He has no business to insult the opposite party ; and certainly none to be rude to his fellow advocates on the other side. He has no right to adopt a different standard of behaviour according as his client his rich or poor ; no right to wax eloquent, because his fees are high and to be meek when the remuneration is low". (Professional Ethics, pp. 212, 213). Walsh says: "Every man from the moment of his call has the same rights and privileges as the most eminent of his colleagues excepting of course the Law Officers and the King's Counsel. It is even bad form, from the moment of your call to address a fellow barrister by the prefix "Mr.". The most junior of all not only may, but ought to, address his revered leader in the familiar manner of "Brown" or "Smith". Within the profession everyone is on the same social level." In England it is not the practice to address a Doctor of Law as "Dr." as all are equal in the profession.

"An incident is related of Sergeant Wilde while he was still a junior. On his first assizes at Exeter the leader of the Circuit, against whom he was engaged, tried to put him down by brow-beating and by openly expressed contempt. Wilde retaliated with such vigour that the assault was never repeated, and the dauntless junior found seventeen

retainers at his lodgings that evening (Victorian Chancellors, Vol. I, p. 421). When on a certain occasion Lord Halsbury found himself improperly treated by the Attorney-General, the former gave vent to his indignation thus: "I can only say the Attorney-General has referred to his character as Attorney-General. In this Court he is simply the counsel representing one of the parties, and he has no greater authority than any of the most junior members of the Bar present. I utterly refuse to have my conduct dictated, or insinuations made against me, by the Attorney-General, or any other members of the Bar" (Victorian Chancellors, Vol. II, p. 438 quoted in Professional Ethics, pp. 338, 339).

Courteous treatment on a footing of equality is not the only thing which a junior has the right to get from a senior. It is also the duty of a a senior to assist the junior in every possible way. If the junior has doubts regarding any point and seeks the advice of a senior he ought to give him the benefit of his advice ungrudgingly. It is also the duty of a senior to see that juniors are taken in whenever there is an opportunity. If a client is able to pay, the senior should recommend the appointment of a junior. In England the junior gets a fixed proportion of the fees paid to a senior. There is no such rule here. It is desirable that the senior should fix the fee of the junior and whatever may be the fee agreed upon, it is the duty of the senior to see that it is paid to the junior before the case is heard.

Sundara Aiyar in his 'Professional Ethics' gives much valuable advice on the relation that ought to exist between senior and junior. A few extracts are given here:

"It is another important duty that an advocate should

treat all his brethren equally, whether they are senior or junior. I need hardly repeat that courtsey and good-will are due to all. But apart from that, equality of treatment is required in a higher degree. Take the case of a senior for instance. He should treat all the juniors with equal consideration. He should not push some juniors to the front over the heads of the others. He should not deprive any junior of the opportunity of getting an engagement by showing any preference to particular juniors." (Professional Ethics, p. 323). There is now much dearth of work for the juniors on account of over crowding at the Bar, and some relief is possible if a rule is adopted by the Bar Association that every senior with large practice should get by rotation engagement for a number of junior allotted to him, whenever there is an opportunity.

"Nothing in the manner in which a senior treats his junior should lead to any impression on the part of the client that the junior is not liked or his services are not appreciated by the senior. A generous senior will applaud the services of his junior to his client and would recognize the value of his work in the presence of his client whenever he can do so properly, but even if a junior is not able to do his work properly, the senior should abstain from commenting on his work in the presence of the clients" (Professional Ethics, p. 325).

"To juniors another piece of advice is necessary. It is natural that they should like to produce an impression on the mind of the client that their services are of value. But no junior should do anything which will prejudice his senior in the estimation of the client. He should not detract from the value of the work done by the senior.

It may be that, in many cases, a great portion of the work is to be done by the junior. He should not, by any statement or conduct on his own part, make the client think that he is the more important factor in the case, and any criticism respecting the senior should be strictly avoided. It is a failing, natural perhaps, but very much to be deprecated for the junior to attempt to get credit for success when it is achieved. Neither the senior nor the junior should do so. So far as the client is concerned they are to regard themselves as one, and if a case fails, the junior ought strictly to abstain from any statement to his client that failure was due to the senior not taking his suggestion or advice." (Professional Ethics, p. 330, 331).

"At the same time a junior should not be too submissive to a senior. It is often the fact that a particular point of view does not strike the senior, and the mere mention of it may not enable him to appreciate it at once. By all means let the junior press his view with the respect due to the senior firmly and with independence, but here his duty is at an end." (Professional Ethics, p. 322, 333).

"It may happen sometimes that a senior considers a case hopeless, not worth arguing. The junior takes a very different attitude. He thinks there are very fair chances of success. If the junior is capable and his advocacy is good, a senior should be acting rightly in such a case to leave the argument to the junior. Some of the best counsel in Madras have often acted on that view. It may also happen that the junior is more capable than the senior. The senior may know it. He may feel that this junior's argument is likely to succeed, while his own may not. I have no doubt that in such a case, it

would be most proper for the senior to allow the client to have the benefit of the junior's argument. I do not suggest that he should do anything which will be detrimental to his own reputation. But, I do not think the reputation of a person would be seriously affected by recognising the superior capacity of another. Generally, every man is rated at his proper worth by the public, and I think a senior's reputation will be enhanced by recognising merit in others." (Professional Ethics, p. 337).

It need hardly be said that an advocates demeanour and bearing in Court must always be respectful. This does not mean only respect for and courtsey to the Court. The officers of the Court and other subordinates should also be treated with equal consideration and courtsey. Sundara Aiyar says: "To those who are in attendance as ministerial officers courtsey is due, and any improper or offensive conduct towards them would be contempt of Court. So also any insult offered to the jury who are deciding a case would be contempt of Court. Imputing corruption to the jury, it has been held would amount to contempt of Court." (Professional Ethics, p. 109). Strong expressions or haughtiness in a Court of Justice can never be tolerated and bring discredit on the advocate. Threats and contemptuous utterances to the Bench or boisterous conduct are contempt. Imputing partiality or suggesting that the mind of the Judge has been made up is contempt. An advocate guilty of contempt is punishable by the Court. "The Court has power to punish a barrister for contempt of Court in respect of acts done by him either in a private or in a professional capacity. A barrister may be punished for contempt in respect of

language used by him in the discharge of his functions as an advocate. Expressions which might be uttered in the honest discharge of counsel's duty, and which if so uttered would be privileged, are when uttered with the intention to insult the jury or the Court, are abuse of the privilege of counsel and may be punished accordingly by the judge." (Hals. Vol. II, p. 647).

The solemnity of the business and the dignity of the profession require that there should be no squabble or wrangling in Court between the practitioners themselves. "So long as Courts of Justice remain Courts of Justice, there must be decency maintained"—per Bayley, J. in *Trial of Hunt and others* (1820) 1 St. Tr. N.S. 382. "Pray let us have no laughing, it is not decent"—per Wright, L. C. J. in the *Trial of the Seven Bishops* (1688) 12 How. St. Tr. 344. As to noise in Court, the following remarks of Jefferies, L. C. J. must be interesting to us in these days: "I hope we are now past that time of day that humming and hissing shall be used in Courts of Justice ; but I would fain know that fellow that dare to hum or hiss while I sit here ; I will assure him, be he who he will, I will lay him by the heels and make an example of him. Indeed I knew the time when causes were to be carried according as the mobile hissed or hummed ; and I do not question that they have as good a will to it now. Come Mr. Ward, pray let us have none of your fragrancies, and fine rhetorical flowers, to take the people with." (*Pritchard* v. *Papilon*, 1684, 10 How. St. Tr. 337. "Loud laughter should be avoided, and certainly so, in such a manner as to disturb the argument of the opponent. That is certainly not proper. It might well be held to be contempt, but the question is

not whether it might amount to that or not. I have no doubt that it should not be indulged in." (Professional Ethics, p. 121).

"The reading of newspapers in Court is regarded as improper in England, so, I take it, would be the reading of novels. I think I may say that obtrusive private conversation should be avoided in Court." (Professional Ethics, p. 120).

With respect to the advocates duties towards the Court the following rules enacted by the Council of the American Bar embody the highest ideal and afford a precious guide:—

"It is the duty of the lawyers to maintain towards the Court a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamour. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievance to the proper authorities. In such cases but not otherwise, such charges should be encouraged, and the person making them should be protected.

"It is the duty of the Bar to endeavour to prevent political considerations from outweighing judicial fitness in the selection of judges.

"Marked attention and unusual hospitality on the part of lawyers to a judge, uncalled for by the personal relations of the parties, subject both the judge and the lawyer to misconstructions of motive, and should be avoided. A lawyer should not communicate or argue privately with

the judge as to the merits of a pending case, and he observes rebuke and denunciation for any device or attempt to gain from a judge special personal consideration for favour. A self-respecting independence in the discharge of professional duty without denial or diminution of the courtsey and respect due to the judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

"A lawyer assigned as counsel for an indigent prisoner ought not to be asked to be excused for any trivial reason, and should always exert his best efforts in his behalf. The key to the solution of any difficulty in a question as to how to behave towards the Court in a particular contingency will not be difficult, if you remember, on the one-hand, that you are partakers with the judge in the administration of justice, that your duty is to help him in it, and that, on the other hand, you have a right to expect from the judge that your client should have a fair hearing with respect to his grievances, that as members of an independent profession you have a right to urge every legitimate argument open to you on behalf of your client, and to bring before the Court every material that ought to influence it in its decision. At the same time as members of an honourable profession nothing, again, should be done by you which will in any way be unbecoming as members of the public or as loyal citizens of the state. Nor would you in any case consider it your duty, to do anything which is calculated to diminish your own self-respect or to dwarf your own soul." (quoted in 18 M.L.J. 434).

If the Judge happens to be his class fellow or intimate friend, the advocate should on no account take advantage

of the personal relation while conducting his case in Court. His conduct should be such that no one can for a moment suspect that his relation with the Judge, so long as he is advocating in Court the cause of his client, stands on any footing other than that of a lawyer and Court. He should be particularly careful in this respect as the expression of any other attitude will lead to misconstructions of motive. It is his duty to maintain with the outside public the absolute impartiality of the judge. If he is a near relation of the judge, it is improper to accept any brief involving work in his court. The late Sir Gurudas Banerji of revered memory set an example in this direction and his sons and son-in-law (now a Judge of the High Court) did not practise in his Court. In a recent case (*Statesman*, Dec. 2, 1926) a junior counsel who was a near relation of the Master was engaged by a party to argue a reference before him and allegations were made by the opponent against the impartiality of the Master. When the matter came up before the Judges (B. B. Ghose and Duval, JJ.) observed: "It is undesirable that a member of the legal profession should practise in a Court presided over by a near relation." (*Nittaranjan* v. *R.*, 29 C.W.N. 648: 88 I.C. 607). The Bar Council in England gave the following opinion on the point: "It is almost inevitable that partiality will be suspected, even though there may be no real ground for such suspicion. The practice might even lead to briefs being delivered to the barrister because it is believed that his client would have an unfair advantage over his opponent." As John Stuart Mill has said: "It is not enough that justice is done, but it should be done in such a way that those to whom it is done, should feel that

justice is being done." The same sentiment was expressed by Lord Hewart, L.C.J. when he said: "It is important that justice should be done; it is hardly less important that it should manifestly appear to be done."

Acceptance of vakalatnama should in all cases be unconditional (14 W.R. 7). A vakil is bound to appear and conduct his case even if the fee or any portion thereof remains unpaid, in the absence of any agreement to the contrary or at least notice to that effect to the client in sufficient time to enable him to make other engagements (23 M.L.J. 447; 37 M. 238; 44 M. 978). A pleader must not accept vakalatnama when he knows that he cannot act for his client throughout the proceedings (36 B. 606). Where owing to the absence of a pleader, a case is dismissed for default, the onus heavy on him to explain the true state of affairs to the Court and to his client (14 I.C. 965: 22 M.L.J. 276).

Where pleaders refuse to appear in a Court in pursuance of a resolution to boycott the Court as a protest against some alleged grievance their conduct is improper (26 C.W.N. 580: 35 C.L.J. 403). The relation of pleader and client involves the highest personal trust and confidence, so much so that it cannot be delegated without consent. A pleader is more than a mere agent or servant of his client. He is also an officer of the Court and as such owes the duty of good faith and honourable dealing to the Court before which he practises his profession. Concerted action by a whole body of legal practitioners to boycott a Judge or Court in protest against an alleged wrong of one of its members or in respect of its conduct in the administration of justice generally is not permissible because the Bar cannot constitute itself an authority to

adjudge on such grievance and its duty is not to impede the administration of justice by collective abstention from Court, but to seek relief by representation to the High Court. Any attempt on the part of a pleader to boycott the Courts or to obstruct the administration of justice by a resort to any form of device constitutes ground for disbarment or suspension (26 C.W.N. 589 : 35 C.L.J. 356).

The following extracts from the rules of General Council of the Bar will be of interest to the legal profession in India :—

"The attention of the Council has been drawn to certain advertisements in a Legal Directory published in America in which the names of the members of the English Bar, together with their London addresses, were set out, and which appeared to the Council to constitute an infringement of the rule of professional etiquette that an English barrister should not advertise.

"It is undesirable for a barrister to accept a brief for a company of which he is the director.

"It is undesirable for a barrister to appear either for or against a County Council or other local authority of which he is a member.

"A barrister practising in England does not commit any breach of professional etiquette in advising on contentious questions (either before the commencement of or during litigation) within the jurisdiction of an Indian High Court upon instructions sent direct from the solicitor of an Indian High Court without the intervention of a solicitor of the English High Court.

"There is no rule of the Profession preventing a junior barrister from accepting a brief to take notes either for a party to an action or for some person interested, but the Council have no doubt that a junior briefed ought not to take any part in the trial or hearing or to do anything whatever but that for which he is briefed, viz., to take notes; and that it is the duty of the Counsel briefed to conduct the case, to prevent such junior briefed to take notes, from taking any part in the trial or hearing.

"A barrister ought not to recommend another as his leader or junior. And such questions as, Who is the best man for a witness action in such a Court? Which leader is the *persona grata* in such a Court? Do you get on all right with X as your leader? are improper questions, and should not be answered.

"A practising barrister should not as a general rule carry on any other profession or business or be an active partner in or a salaried official or servant in connection with any such profession or business. There are undoubtedly exceptions to the general rule. Financial business is not an exception to the general rule . . . . . There is no objection to a practising barrister acting as an ordinary director (*i.e.*, not a managing director) of companies of good standing carrying on a business which is free from anything of a derogatory nature.

"It is not permissible or in accordance with professional etiquette for a counsel to hand over his brief to another counsel to represent him in Court and conduct the case as if the latter counsel had himself been briefed, unless the client consents to this course being taken. This applies equally whether the counsel are both junior or both King's counsel.

"It is contrary to professional etiquette for a barrister to answer legal questions in newspapers or periodicals, whether for a salary or at an ordinary literary remuneration, (1) where his name is directly or indirectly disclosed or liable to be disclosed; (2) where the questions answered have reference to concrete cases which have actually arisen or are liable to arise for practical decision.

"It is undesirable for members of the bar to furnish signed photographs of themselves for publication in legal newspapers.

"When a barrister accepts a brief upon an express understanding that he will personally attend throughout the case, he ought, if he does not so attend, to return his fee.

"A barrister should not accept a retainer in a case in which he has reason to believe he will be a witness, and if being engaged in a case, it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear as counsel if he can retire without jeopardising his client's interests. Nor

should counsel accept a brief before an appellate tribunal when he has been witness in the Court below."

[Under s. 118 of the Evidence Act counsel though engaged in a case are competent to testify whether the facts in respect of which they gave their evidence occurred before or after their retainers. At the same time, as a general practice it is undesirable, when the matters to which the counsel depose is other than formal, that they should testify either for or against the party whose case they are conducting. If counsel knows or has reason to believe that he will be an important witness in a case he ought not to accept retainer therein; *Weston* v. *Peary Mohan*, 40 C. 898; see *Lodd Govindass* v. *Rukmani*, 29 I.C. 135 : 17 M.L.T. 382; *Cobbett* v. *Hudson*, 1 E. & B. 11 not following *Stones* v. *Byron*, 4 Dowl. & L. 393.]

CHAPTER V.

BENCH AND BAR—CONDUCT IN COURT.

Both judge and lawyer are necessary evils, if evils they may be called—the one administrates justice and the other helps in the administration of justice. Both are participators in the same business playing the parts assigned to them. Broughmam, L.C., said: "The interests of justice cannot be upholden, the administration of justice cannot go on without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting the rights and obligations which form the subject of all proceedings" (*Greenough v. Gaskell,* 1833, 1 Myl. & K. 98). A cordial relation between the Bench and the Bar and mutual confidence are extremely necessary for the smooth administration of justice. The advocate is an instrument of justice and both he and the Judge have their parts to play. A strong and independent judiciary is a strength to the State and an independent bar is no less important. Lord Mansfield, said: "The judges are totally independent of the ministers that may happen to be, and of the King himself." An independent judiciary is the only protection against tyrrany and oppression and the whims of the Executive. Unfortunately the administration of criminal justice in this country does not inspire the same confidence as the administration of civil justice on account of the fusion of judical and executive functions in the same officer. In so far back as 1899 Lord Hobhouse, Sir Richard Garth (Chief

Justice Calcutta High Court), Sir Charles Sarjent (Chief Justice, Bombay High Court), Sir William Markby (Judge, Calcutta High Court) and several other retired Judges and high officials sent a memorandum to the Secretary of State strongly advocating the complete separation of judicial and executive functions and expressed themselves thus: "The existing system not only involves all whom it concerns in hardship and inconvenience, but also by associating the judicial tribunal with the work of the police and detectives and by diminishing the safeguards afforded by the rules of evidence, produces actual miscarriage of justice, and creates, although justice be done opportunities of suspicion, distrust and discontent which are greatly to be deplored." The much needed reform of the separation of judicial and executive functions has not yet been carried out although the educated Indians have been agitating for nearly half a century. The evil effects of the present system has been demonstrated from time to time and in a recent case the Calcutta High Court again had to make adverse comments on the conduct of the subordinate magistracy. In a prosecution under ss. 147 and 324 I. P. Code the complainant who was a relation of the accused filed a petition of withdrawal of the case, but the deputy-magistrate forwarded the petition to the Superintendent of Police instead of passing orders himself. He subsequently recorded the following order: "S. P. has not given his assent to the withdrawal of this case. It will therefore proceed." In the end the accused was convicted and Mr. Justice C. G. Ghose in making the rule absolute observed that "it was improper on the part of the magistrate to have referred the petition of withdrawal to the superintendent of police when it was the magistrate's own

duty to deal with the same." Their Lordships deprecated such conduct all the more because "it was necessary to remove the impression which would otherwise gain ground that the police has considerable influence on the magistrate." (Statesman, Dec. 11, 1925).

A free and independent judiciary fosters the growth of an independent bar. The objects of law are to secure rights of property and person, to protect the weak and oppressed, to punish offenders and to enforce law and order. The advocate must help the Judge in securing these objects and he must discharge his duties without fear or favour. He has a right to press his client's case in the manner which appears to him most appropriate and the Judge can never interfere in the discharge of his duties, if he keeps himself within the bounds of propriety and law. The Judge will not always agree with him, but none the less he has a right to make his submissions in a polite and inoffensive manner, so long as there is a genuine attempt to convince the Judge by putting forward a particular point of view. If he has a conviction that the method pursued by him is right, any interference ought to evoke a firm but dignified protest. If his attitude is not that of a combatant and he does not travel outside the record and there is no attempt to mislead the court or to misrepresent facts, he will find the Judge in a receptive mood however long he might argue. There is no discomfiture in avowal of mistake. If he has erred, he must admit his mistake immediately it is pointed out. Cussedness creates a spirit of rivalry and brings discredit on the advocate. If an argument is persisted in for argument's sake it irritates the Judge. It is a mistake to think that a Judge has a liking for an advocate who is accomo-

dating in every respect, even to the point of being timid. If the point is right and is pressed firmly but politely, the astute judge will appreciate his pluck, although he may remain unmoved before the public. The advocate will have established his mark and earned his confidence. On the next occasion the advocate will find the Judge quite sympathetic and they will understand each other very well. If after all his submissions, the ruling is against the advocate he will have done his duty. He should then accept the ruling with good grace without any display of disappointment or temper. Jefferies, C.J., said: "It has always been the practice heretofore, that when the Courts have delivered their opinion, the counsel should sit down and not dispute it any further" (*Case of Titus Oates*, 1865, 10 How. St. Tr. 1186). If the advocate is overruled on a point which appears to him to be of substance he should insist upon a proper record being kept of the proceedings. This is necessary in appealable cases. If any objection is raised or a particular point is argued or some evidence tendered is rejected, he should be careful to see that the matter appears on the record. If the Court declines to make a note of it, the better course is to file an application stating the facts, for the Judge will then record an order giving reasons for the adverse ruling.

Sundara Aiyar says: "Without failing in respect to the Bench it is the duty of the member of the bar to assert their just rights to be heard by the tribunal before which they are practising. They should be fearless and independent in the discharge of their duties; they would be perfectly right in protesting against irregular procedure on the part of any judge, and if the advocate is improperly checked or found fault with—that is, not if any observa-

tions are made on the merits of the case, but if the advocate is improperly dealt with—he should vindicate the independence of the bar. He would be perfectly justified in insisting on getting a proper hearing, and he would have the right to object to any interruption with the course of his argument such as to disturb him in doing duty to his client. But every advocate should remember that, after all, his object is to convince the Court, and it would be quite right and expedient on his part, as indeed it is his duty, to listen to any expression of opinion by the Bench and to answer any question that the Bench might put in order that he might be able to make the judges understand his exact position." (Professional Ethics, pp. 99, 100).

The fearlessness, honesty and earnestness of an advocate are bound to elicit the admiration of a Judge and to earn his confidece in no time. A lawyer who loses the confidence of the Judge, will lose the confidence of the client. Flattery and subserviency are never appreciated by a Judge, whatever his eccentricities or failings might be.

Reference has already been made to the independence of the Bar. The independence of the bar is a matter of anxiety to all persons interested in the welfare of the State. If the liberty of the subject is threatened or interfered with, it is an independent bar that will champion the cause fearlessly and secure justice. From this point of view, the independence of the Bench is equally important. The Bench must be entirely free from the influence of the Executive or outside persons, in order that it may enjoy the fullest confidence of the public. The independence of the Bar is in no way antagonistic to the

independence of the Bench and the two may well thrive together. But in his eagerness to press his client's case the advocate should never step over the well defined limits. Independence in the legal profession does not mean liberty to do and say anything a man pleases. It is the liberty to do his duty to the client without fear or favour. There is restraint everywhere in our life, and life would not be worth living if every one had unrestrained liberty. A calm unruffled temper and politeness to all is an absolute safeguard against scenes in Court. Insolence or impertinence should not be mistaken for independence. Some junior members of the profession are apt to think that if they have made a sharp or rude retort to the Judge, they have shown enough independence. They will soon realise that such tactics do not pay or win approbation. Lawyers have a duty not only towards the client but also towards the Court and they are to co-operate with the Court in the orderly and pure administration of justice. It is a serious thing to offer an imputation against the impartiality of the trying Court or to make offensive remarks when a ruling is given against the advocate's contention. He has every right to make his submissions and to protest firmly but politely. But judicial rulings must be accepted without murmer.

In a case the Court in discharging a rule obtained for transfering a case from a deputy magistrate's Court, observed that the conduct of the petitioners and that of their counsel in the lower court was responsible for much of the bitterness in the incidents which had happened. The counsel had remarked that trials before "deputy magistrate were a "farce and a camouflage" and on the magistrate's protesting against such an unwarrantable and

unjust observation of counsel the latter said that he would not listen to the magistrate. Upon that the magistrate said that counsel, if he liked, might leave the Court. C. C. Ghose J., said that "it was a matter of profound surprise and abiding regret that any counsel should be found to betray himself in language such as that complained of by the trying magistrate." (*Surendra M. Maitra and other* v. *R.*, Statesman, 15-8-28, Ghose and Jack, JJ.)

In a recent case (*Re Mahendra Lal Ray*, 27 C.W.N. 88) a senior member of the bar made an imputation against the fairness and impartiality of the Court and his conduct was sought to be justified by the specious plea of independence of the bar. He was suspended for a month. Richardson, J., observed:—

"I wish that gentlemen belonging to the learned profession of the law would get it out of their heads that any one desires to curtail the privileges of the Bar or interfere with its independence. I take it that independence in this connection means freedom to do one's individual duty without fear or favour of any man. The independence of the Bar is recognised as a valuable asset in the civil life of the community and is, as I regard the matter, a corollary of that independence which appertains in the same sense to the Bench. I know of no quarter from which the independence of the Bar in that sense is in any way menaced unless there be a hint of danger arising from Associations formed by the members of the Bar themselves. There may be a tendency on the part of such Associations unduly to restrict the liberty of individuals in matters not strictly pertaining to professional practice. But if there be such a danger, or such a tendency, the members of the profession have the remedy in their own hands. Incidents will, of course, occur from time to time which have better not occurred. After all men are human, whether on the Bench or at the Bar, and in the heat of the moment, expressions may be used on one side or the other which are not within the

bounds of propriety, but in the great majority of such cases an apology or an expression of regret for over-hastiness in speech, tendered and accepted in the right spirit, would be sufficient to terminate the incident. Relations between the Bench and the Bar can be adjusted only on a basis of mutual respect and mutual anxiety that justice should be duly administered." In the same case Sanderson, C.J., said: "I yield to none in my desire to see the independence of the Bar maintained. . . . . the independence of the Bar has been in the past, and I hope will be, in the future maintained without making gratuitous and unfounded imputations upon the fairness and impartiality of the tribunal."

A pleader while arguing for the defence in *R.* v. *Suresh Chandra Chatterji* said that the evidence of a deputy magistrate was unreliable inasmuch he had been promoted to the Bengal Civil Service for improperly helping the police in the verification proceeding in connection with the confession made by one of the accused in the case. The pleader was suspended for a week (*R.* v. *Probhat C. Dutt*, Statesman, 22-3-1927, Panton and Mitter JJ.). It is misconduct for a professional man not only to make charges against a public judicial officer which he knows to be false, but charges which he must know he has no reasonable prospect of substantiating (*In re N. D. a pleader*, 55 M.L.J. 170). A letter by a lawyer containing vulgar abuse of the magistrate and a demand for an apology apparently followed by the threat of further proceedings is highly improper. Instructions from a client are no excuse whatever for a pleader exceeding what is his duty towards the Courts, as it is presumed that a pleader knows what his responsibilities are in addressing magistrates and judges (*Govt. Pleader* v. *Takte*, 25 Bom. L.R. 264). As to insulting letters addressed to a judicial officer, see *In re Amrita Lal*, 42

All. 86 and as to insulting affidavit filed before a judicial officer, see *Dist. Judge, Kistna* v. *Hanumanulu*, 39 Mad. 1045. Charge of impropriety or inattention cannot be lightly made against a judge (*In re W. S. Day*, 81 I.C. 973). A lawyer who writes to a judicial officer indicating the manner in which a particular case is to be decided, is guilty of professional misconduct (*In re Narendra Singh*, 44 I.C. 123). No resolution can be moved by a pleader in a public meeting denouncing or protesting against the conduct of a judge in passing a sentence against an accused (*Govt. Pleader* v. *Jagannath Sammant*, 10 Bom. L.R. 1169).

Work in Court demands the exercise of self-control and forbearance at every step. It is quite a different atmosphere and liberties or effusions of temper which one is accustomed to find outside must be restrained. This is also a part of the training for the profession. The orderly and dignified manner in which business in conducted in the higher courts of justice are seldom found in other courts. The higher a man rises in the profession the greater is the conception of responsibility. Duties should be performed with firmness but without display of temper. A quick tempered advocate is sure to land himself into trouble soon. Petulance or excessive argumentativeness will mark a lawyer out as a cantankerous advocate. Overweening conceit or assumption of the airs of a High Court Judge in whatever he says, makes an advocate the object of derision. The advocate must acquire the habit of keeping a cool temper howsoever strong or multifarious the provocation might be. Under no circumstances should he lose self-control and presence of mind. His composure must be maintained under all circumstances. This is

well illustrated in the lives of eminent advocates. David Paul Brown says: "By all means, in all circumstances, maintain your composure ; if you lose that you lose all. *If asked what is the most desirable attainment of a lawyer, we should say composure.* A wealthy and venerable gentleman of this city, whose only son had been admitted to practice, called upon us, and with a perfectly natural interest in the future advancement of his son, inquired what course we would recommend in order to his success at the bar. 'Your Son', was the reply, 'has had an excellent education in literature and in law. All that he will require, in order to render his faculties and learning available is composure.' 'Ay', said the anxious parent, 'but how is that to be acquired?' 'That' we replied, 'must depend upon himself and upon time and circumstances. He must learn it as Peter the Great learned to conquer, by being flogged and defeated over and over again, deriving instruction from every overthrow. In short, he must let no man be master of his temper but himself."

Protracted work for hours together and exchange of dealings with numerous lawyers and litigants may sometimes make the Judge impatient, specially if he is not physically fit. Some men are constitutionally unfit for what is known as judicial temper. If a Judge has to deal with say fifty persons in a day, on him falls the greater portion of the strain and to each individual goes a small fraction of it. It is an intellectual contest all day long and the Judge has to work very long hours under trying circumstances. It is not therefore unnatural that temper should at times get a trifle unruffled. Clever men will realise this feature of the every-day contest and adapt

themselves to circumstances. The Judge too will realise the difficulties of the advocate. The strain on the advocate is no less severe. He has to keep before him all the facts of the case and to hear attentively the statements of the witnesses. He has to think out questions for cross-examination and to object at once to the admission of irrelevant or inadmissible evidence. He has to keep a vigilent eye on his opponent and to watch the Court. A witness suddenly deposes to facts contrary to his expectation or instruction and he has to make up his mind immediately how to deal with the matter. Even when on his feet he has to think and shape his case according to the facts disclosed at the trial. He may have to take notes now and then or to inspect documents produced by the other side. He has to attend constantly to the interruptions of his client who gets unnerved at every statement of his opponent's witnesses. He has to keep his head cool in the midst of these and other distractions. There must be forbearance and toleration on both sides and a desire to help each other in the administration of justice. Impatience or rise of temper cannot be overcome by display of similar impatience or use of indiscreet language. If the judge has his short comings, the advocate should exercise forbearance and try to bring him round, without indulging in recrimination. This will never be taken as weakness, but is bound to enhance his reputation. If one fails in his duty, there is no reason why the other should also sin. Judges and lawyers are human and in the heat of the moment they are sometimes apt to forget themselves and to use expressions which they never meant to utter. Instances of friction between the Bench and the Bar are rare, but nevertheless there have

been unhappy incidents in the past and there will be more in the future so long as Courts of Justice exist. A spirit of partisanship or rivalry sometimes gets the upper-hand and expressions are let loose which one would certainly repent for at cooler moments. Sometimes it is the result of misunderstanding. In most cases a quick *amende* from the offending party is all that is necessary to restore the mental equilibrium.

Sundara Aiyar says: "It is the duty of members of the Bar to treat the Bench always with courtsey and deference. It is possible that a judge may sometimes exhibit impatience, or he may appear to be rough. The best way to overcome it is not by exhibiting similar impatience or roughness, but to a certain extent by bearing with the judge. Consideration for the Bench should never be withheld ; it is sure to have the advantage of making the Bench itself more considerate. An advocate should have faith in the absolute impartiality of the Bench. There should be no tendency to suppose that because the Bench—it may be very wrongly sometimes—is unable to see eye to eye with an advocate who is convinced that his view is correct, the Bench is biassed or prejudiced. We know very well that what appears very clear to one, may appear very differently to another person, and what appears clear to one at one time appear far from so at another time. One may often be possessed by some one idea ; it may happen that the judge's mind assumes a certains attitude sometimes which the judge himself is unable to shake off ; but it is absolutely necessary that the bar should have faith in the absolute impartiality of the judge, however much he may be mistaken." (Professional Ethics, p. 88, 89). The rules enacted by the

American Bar with respect to the advocate's duties to the Court have been reproduced elsewhere (*ante* p. 109).

Intentional insult or interruption to any public servant while sitting in any stage of a judicial proceeding is punishable under s. 228 I. P. Code read with s. 480 Cr. P. Code. Sundara Aiyar says: "In many a case, if a pleader behaves improperly, there is a very ready remedy open to the judge instead of making too much of it and proceeding against him to extremes. The best course is to refuse to hear him, until he withdraws any improper statements that he might have made. There would be practically no appeal against such act on the part of the judge. Sometimes judges have gone so far as to refuse to hear a particular pleader at all in any case, until he makes reparation for misconduct in one case. It would be mostly quite enough to refuse to hear him in the particular case." (Professional Ethics, p. 114).

The cross-examination of a witness is a subject beset with danger. The legitimate use of cross-examination is the discovery of truth and exposure of falsehood. It is a most potent weapon which the advocate has got in his armoury, if it is properly handled. If it is misused or abused, it is certain to recoil on the advocate. It is however most difficult to acquire a high degree of skill in cross-examination and it may be safely said that although advocates may by their efforts become good cross-examiners, some men are born with a genius for cross-examination. One method of cross-examination is to go straight at the point and attack the witness directly. This is known as the direct method and it succeeds only at the hands of advocates of commanding personality and large experience. This sort of vigorous cross-examination often

fails to break the witness. It is not easy to draw out by bullying, things which a witness has come prepared to conceal. The contest leads to unpleasantness and recrimination. If a witness is questioned in a manner which assumes that he is lying or if an attempt is made to mislead him, he resents the attack and at once prepares himself for the fight. In the case of a witness of truth, he strengthens his statement by giving details which he is reminded of when questioned minutely. The genial and friendly way is by far the most successful method of cross-examination. If the witness is approached cautiously and courteously without letting him know that his answers have surprised or displeased the advocate and a sort of confidence is established by a conciliatory attitude, he may be led away imperceptibly from the statements which he made in examination in chief. In a recent speech delivered in London, Sir Walter Schwabe, K. C. late Chief Justice of the Madras High Court said: "Cultivate a pleasant manner and get on as friendly terms as possible with the witness. Reproving, lecturing, bullying were methods now recognised as belonging to a first generation. One should bring out the unpleasant facts with an air of condolence and regret rather than with an air of triumph, which might raise sympathy and one should never lose one's temper with a witness." Witnesses come with a dread of being bullied and snared into making inconsistent statements and when they are disarmed of the fear by courteous and sympathetic treatment, they enter into a frank discussion little suspecting that they would soon disclose the weak points in their testimony. Before a witness is cross-examined, the advocate must ascertain the points on which such examination is necessary. Cross-

examination is necessary only when the witness has said something against the client which, if allowed to go unchallenged would injure the case. This standpoint is so often lost sight of and it is common experience that an advocate rises to his feet and heckles the witness at random for a considerable length of time, although the witness may not have said anything of importance against his client. This aimless cross-examination is done with two objects in view: First, to see if anything may be elicited by fishing questions on a variety of topic. Secondly, the advocate is obsessed with the idea that if he does not cross-examine for some time, his client will doubt his competency. The object of cross-examination is to destroy or weaken the effect of the testimony of the witness and to establish the opponent's case with statements elicited in his favour. Questions should be asked with this object in view. Questions for question's sake or a roving cross-examination is attended with danger. It is a mistake to suppose that good may come out of such a procedure and that it can do no mischief. There is no such thing as harmless cross-examination. The reckless asking of questions introduce in most cases matters which tell against the examiner. Very often it is found that witnesses who have said little or nothing against the cross-examiner's client are led to make damaging statements because they are unnecessarily provoked. Silence is far better on occasions like these.

Cross-examination to credit is a thorny subject. It is attended with the greatest danger unless the advocate is extremely cautious. The matter has been much discussed in England on account of the abuse of the privilege and it is regrettable to find that the position in India is not

much better. We hear the same complaint about witnesses being maltreated and disgraced by imputations against their character. Cockburn, C. J. said that "in England the most honourable and conscientious men loathe the witness box." An unjustifiable attack on the character of witnesses at the mere dictation of a party who is often actuated by spite, is calculated to scare away honest men from the witness box. It is a common sight to see witnesses being insulted and annoyed by offensive questions which have no possible bearing on the points in issue or on their veracity. Questions regarding family life, private affairs, long forgotten improprieties of conduct are asked with no ostensible reason but to disgrace them personally. The public view with alarm the abuse of the privilege. From the point of view of the interests of the client also, it does more harm than good. Very often after an unsuccessful attempt to get answers in his favour or to shake the testimony of a witness, he is abused and unfounded imputations are made on his character. This outrage on his feelings naturally provokes the witness to make statements against the cross-examiner's client which he world not have said under ordinary circumstances. How can the advocate expect to advance his client's cause, if he deliberately insults a respectable witness or makes a personal attack? The inevitable result is that the judge and jury feel sympathy for the unfortunate witness and exactly the opposite result is produced. It should be remembered that however sinister the suggestion might be, the cross-examiner is bound by the answer of the witness. If a denial is given, it must be accepted and no evidence can be tendered to contradict the witness (see s. 153 I. Evidence Act). So, unless the attack is justified,

the repudiation by witness would raise the presumption that his statement is true. At the same time there may be cases when a man of notorious character who pretends to put on the veil of virtue and wilfully perverts the truth, should be mercilessly exposed. Such a man ought not to be allowed to leave the witness box without being found out. But although an advocate may have in his possession materials for staining the character of a witness, there must be a proper occasion for it. The particular circumstances of the case ought to justify the attack.

If lawyers will not desist from abusing the privilege, it would be the duty of the Court to interfere and stop such attacks. Section 148 of the Evidence Act lays down the principles which determine when such questions are proper or improper. It is often not easy for the Judge to determine beforehand whether the questions are really justified. Questions which may appear at first sight to be useless may at another stage be found to be pertinent. The discretion must therefore rest in the first instance with the advocate and the Judge is naturally unwilling to interfere. His respect for the profession, instincts of gentlemanliness and the requirements of the case ought to dictate whether the questions are proper or improper. If however, the confidence is abused, and personal invectives are indulged in with the sole object of satisfying the grudge of the client, the Judge must interfere. Making grave and scandalous charges against Judges or the opposite party on the mere wishes of clients is misconduct. Pleaders are not puppets in the hands of the man who pays them (21 A.I.J. 893).

Another complaint is that cross-examination is in most cases inordinately long. There is much waste of

time and this matter also requires serious attention. Sometimes this is the result of coming to examine a witness without adequate preparation. The advocate has to grope his way by surmising many things and making suggestions. The Judge naturally likes to adopt the line of least resistance. He has seen that an attempt to overrule irrelevant questions is followed by a discussion which not unoften takes a longer time and so he lets things take their course reserving to him the right to record or not to record what the witness says. This passive attitude cannot be supported. If he feels that a question is unnecessary or irrelevant, he ought to disallow it at once. Weakness is bound to be exploited on all occasions. A Judge has the right to ask how a question is relevant to the point in issue and when he is satisfied that the question is being pursued for question's sake, or for any unworthy motive, he ought to interfere. Of course there are men who will consciously or unconsciously drift into irrelevant topics or enter into a parley with the witness however frequently they may be pulled up. They are incorrigible men and they can, if they so wish, make a Judge's life miserable every day. But they are exceptions and men like them are to be found in every sphere of life. The idea that it is better to let in some irrelevant things than to consume more time by interference, is productive of many evils. They will open out avenues for fresh cross-examination and when the Judge sits to write judgment he will find himself considerably embarssed by the admission of irrelevant or inadmissible evidence. In criminal cases the admission of such evidence may do irretrievable injury. A witness ought not to be allowed to give hearsay evidence as it is impossible to remove the effect from the mind of

the jury (7 W.R. Cr. 2 ; 2 W.R. 252). The moment the witness commences giving hearsay evidence, the Court, should stop him (7 W.R. Cr. 25 ; 19 B.H.C.R. 498). It is the duty of the Court to exclude an irrelevant document even if no objection is taken by the parties. Omission to object would not render it admissible (57 I.C. 561). Questions as to admissibility of evidence should be determined as they arise, instead of admitting the evidence in the first instance and reserving the question of law as to its admissibility until the final decision (17 Cal. 173 P.C. ; 2 C.W.N. 188).

It is not always safe that a Judge should freely interfere with the discretion of the counsel, while cross-examining the witnesses. But when the privilege is abused, it seems but right that the Judge should exercise some control over cross-examination assuming inordinate length ; 4 C.W.N. cxxi (*Golden River Mining Co.* v. *Buxton Mining Co.*, 97 Feb. Rep. 414 Am. cited). See the remarks of Jenkins, C.J., in *Jaratkumari* v. *Bissessur*, 16 C.W.N. 265. The general abuse of the privilege by recourse to lengthy cross-examination led the Calcutta High Court to issue a letter to the subordinate Courts (G. L. No. 14 of 1919) in the course of which it said : "It is of the utmost importance that judicial officers should keep in view the powers conferred upon them by the Indian Evidence Act and should exercise their discretion in using these powers to disallow cross-examination on immaterial and irrelevant matter or needlessly lengthy cross-examination on relevant matter." The remedy lies with the Bench and the more sensible members of the Bar.

In a recent case Ray J., observed : "The scandalous

length of the examination of this witness and of several other reflects great discredit on the members of the Dacca Bar concerned when it is acknowledged that portions of this evidence is entirely irrelevant" (*Ramsundar* v. *Kali Narain*, 104 I.C. 527, 536). In the same case B. B. Ghose, J. made a similar remark.

"When you have a bad case abuse your opponent" is a trite saying. An advocate should not fall foul of his colleague at the bar. His opponent should be treated with fairness, courtsey, and consideration. He is performing the same duties as you are and has the same privileges and rights which you enjoy. It does not unoften happen that a lawyer rises to his feet and interrupts his opponent every now and then during the cross-examination or address. Such interruption is justifiable only when the opponent is misinterpreting the statements of a witness, or misleading the Court or witness, or putting a wrong interpretation to a document, or doing some such thing. But unless the objection be substantial and require immediate attention, no interruption of any kind should be allowed. Such interruption may do incalculable injury to an advocate by making him lose the thread of his argument or spoiling the effect of cross-examination upon a vital point. The altercation that inevitably follows drives away from his memory, points he had thought out and unsettles his whole scheme. The witness who had almost succumbed or was on the point of making an important statement takes his hint from the interruption and gets time to collect himself and to frame his answers accordingly. A lawyer who interposes at such a moment with the object of diverting the channel of cross-examination and conveying a hint to the witness is certainly guilty of dishonourable conduct.

Another reprehensible tactics is to jump up and stop the witness when he is on the point of giving an inconvenient answer by exclaiming that he has already said so and so, though he has hardly said anything of the kind. The witness takes his cue from the interruption and repeats the answer suggested, to his great relief or takes the hint that he ought not to give a straight reply. If he has already given a reply and the question is redundant, the Court is there to check superfluous questions. No rebuke is strong enough for such interruption. It must always be sternly repressed. Walsh says in his "Advocate" :—"The interruption may itself be founded upon a misunderstanding which has to be corrected, and an argument ensues which breaks off the examination at a critical point in the train of reasoning. It may be of no avail that the interruption is corrected and rebuked. The mischief has been done and it may be impossible to undo it. Any member of the Bar who did it intentionally with the object of creating a diversion, and of assisting the witness, would be guilty of grave misconduct." (p. 149). "It is not only during the reply that interruption should be eschewed. It is objectionable at all times and the rule against it must always be observed. It is at the best bad policy. Interruption leads to altercation, and produces ill-feeling and a kind of disorder. It recoils on the head of its author. It gives the impression that he has a bad case, and is painfully conscious of his weak points, and cannot trust the Court to give due weight to his own arguments presented in their due course, but must needs be constantly endeavouring to drive them home. It is moreover embarassing and unfair to the opponent, who by being constantly diverted from his main theme may be unduly harassed, and fail

to do justice to his case. Nothing is more calculated to give an advocate a bad name, and to create an unfavourable impression about his methods upon the tribunal before whom he appears than a persistent practice of needless interruptions. The same may be said of objections for the sake of raising difficulties. Misconceived objections to evidence and obviously unsound legal points create the worst possible impression, and if constantly repeated may result in spoiling a perfectly good case." (Walsh's Advocate, p. 151).

On the subject of interruption, Sundara Aiyar says: "You may perhaps find that the judge is being influenced by a particular course of argument, and you may feel that your client's case is slipping from under your feet. Remember it is a duty that you owe to your opponent so long as the argument itself is fair, to allow the opponent to produce whatever impression he can, and true advocacy consists in being able to remove that impression if possible when your turn comes. You should act on the principle. "Do unto others as you would be done by." This should always be borne in mind that there should be no improper interruption. Some judges may welcome interruption in order that their own work may be shortened, but it will be the duty of an advocate to discourage such a disposition on the part of a judge, for, unless he does that, the result would be constant wrangling between the advocates and the confusion in court. I would say that if really you decide to interrupt, it is much better that you should do so in a formal, dignified manner, than to make it actually impossible for the other side to go on by muttered interruptions. You have no right to prevent the judge from following the course of the argument on the opposite side. If

you think that the argument is not proper, or that there is matter which you are entitled to introduce at a particular stage of the argument, the proper course is formally to stand up and say that you wish to interrupt, and then state what you have to say. I may fell you that improperly interrupting and abusing the opposite side, or treating the pleader on the opposite side with contempt, or insulting him are all contempts of court (Professional Ethics, pp. 107, 108).

The judge too should offer every facility to each side for putting his case in the way the advocate considers best and maintain a patient attitude throughout. A little tact and geniality of temper will enable a clever advocate to keep the judge in good humour and secure his attention. Every lawyer is entitled to a receptive attitude on the part of a judge so long as there is no attempt to put him on the wrong track and so long as the advocate does not indulge in irrelevant talks or introduce matters outside the record or take an unusually long time by making tiresome repetition. Rambling argument with no particular object in view creates confusion. Some judges are no doubt apt to have an overbearing and impatient attitude, but so long as there is a genuine attempt to put the case from a particular point of view, the advocate would be right in insisting on a proper hearing and respectfully protesting against an improper attempt to check him. But a combatant attitude is likely to inflame the judge and would serve no useful purpose. After all the sole object of the advocate is to convince the judge and to bring him round to his point of view and not to get the upper position in a wordy warfare. Improper interruption on the part of a judge is no doubt an embarassment to the advocate, but

on the other hand an immobile and silent attitude of the judge is not desirable. Intelligent questions now and then on points that raise doubts in the judge, enable the advocate to appreciate what is passing in his mind and furnish him with an opportunity to explain matters which if left unexplained are likely to cause harm. Sundara Aiyar says: "The complaint has of late been very frequent in England that judges often interrupt too much, that argument has practically become a course of interrogation by the judge or the advocate. At the same time, I believe that advocates generally would agree that nothing would be more unfortunate than that the judge should preserve complete silence, for it would not then be possible for a pleader to know whether his argument has been fully grasped or whether there are any difficulties that the judge feels in accepting it. It would be an advantage to him, if such difficulties are put to him by the Court so that he may have an opportunity of convincing the judge that the difficulties are not really insurmountable." (Professional Ethics, pp. 100, 101).

Witnesses should be treated with kindness and consideration. They are as necessary to the administration of justice as the machinery of law. They should not be bullied or abused, and advantage should not be taken of their inexperience, illiteracy or young age. The better way is to create a sort of confidence by coaxing a witness and tackling him gently. The moment a witness suspects that the advocate doubts his veracity from the beginning, he prepares himself for the attack and renders cross-examination futile. Some men have a habit of commenting on the answers of witnesses as they are delivered and this should always be avoided. It creates bitterness and

stiffens the witness and produces a very unfavourable impression on the Judge. An advocate has no right to comment on the testimony of a witness when it is delivered. The comments should always be reserved for the address. It is cheap abuse to call the witness a "liar" at every answer of his. Abuse adds strength to an attack. If the witness has perjured, it must be established by the facts and not by calling him names. If the witness is checky or avoids giving straight answers or circumvents, the Court will protect the advocate. But if the advocate is unnecessarily rude, the attack sometimes recoils on him and he must thank himself for it. A common trick is to treat a witness with contempt and scant courtsey, just to show that he is a man of no standing. It has the opposite effect of evoking sympathy for the witness.

It is common experience that in the mofussil lawyers generally come to Court at a late hour. This embarrasses the Court considerably and causes no less trouble to the litigants. Their cases may go by default and the lawyers have a heavy responsibility in the matter. A judicial officer told the Civil Justice Committee that on an average one hour is lost every day in waiting for the lawyers or sending for them. The Court has a heavy cause list to run through and it is a serious thing to keep the Court waiting and to waste public time. Work or no work, it is always a good thing to come to Court punctually at the appointed hour or earlier. It inspires confidence in the clients. Work may come at any moment and an advocate with a determination to rise in the profession must make it a point to attend Court punctually. Junior members of the profession will profitably utilise their time by watching their seniors conducting cases in Courts. Walsh gives a

bit of sound advice in his "Advocate": "Go to work early, and stay late. Outstay every one till the most belated client must needs have gone." In a recent application for restoration of a suit which was dismissed for non-appearance, Page, J., observed that he "wanted it to be clearly understood that parties or their representatives must be present when their suit was called on ; otherwise it would be struck off and would not be restored except upon proper materials. The time of the Court must not be wasted and the rule laid down must be strictly observed." (Statesman, 24th May 1924). Where owing to the absence of a pleader, a case is dismissed for default, the onus is heavy on him to explain the true state of affairs to the Court and the client (22 M.L.J. 276: 14 I.C. 965).

There is another matter which requires careful attention. Courts are often told that an advocate is engaged elsewhere and an adjournment is sought on that ground. Judicial work would be seriously interfered with and the arrangement of the Court's work would be entirely upset if an adjournment is to be granted for this reason. It is incumbent on lawyers to see that their clients are properly represented when their case is called on for hearing. If they cannot appear, they should arrange for another to take their briefs (68 I.C. 685). If an advocate's hands are full, it is fair and honest that he should ask his client to get another lawyer ready for the occasion, lest he be engaged in another court when his case is called. In a case called on before Coutts Trotter, C.J., Madras, the senior vakil appearing was not present, and he was informed that the vakil was arguing a case in another Court. The Chief Justice, said: "I am not going to pass over any case especially on the appellate side,

on account of the absence at the time of hearing of the practitioner concerned. I mean to ask my brother Judges to come to a similar decision." He went on to say that there was quite a number of intelligent, capable young men at the Bar, who would gladly undertake to argue cases in the absence of their senior. There was no reason therefore, why, cases should be adjourned for the convenience of senior practitioners who were appearing in cases elsewhere. He further observed that in England no barrister who had cases in more than one Court dare stick to one Court without making arrangements for his work being done in other Courts. Finally he said that in future cases would be dealt with even in the absence of vakils. He hoped that the clients knew their rights as against defaulting vakils (Statesman, 1st March, 1924). Lord Reading, late L.C.J. England, expressed himself thus on the question: "I desire to say generally that, while this Court is most anxious to study the convenience of counsel so far as it possibly can, and is ready in every case to adjourn to give effect to the views of counsel who apply for postponement, it is not treating the Court with proper respect for counsel who are briefed in cases not to appear themselves, but to ask other counsel, who had not had an opportunity of mastering the cases, to come here and represent them, so that the Court does not really get the benefit of any argument. Counsel cannot be in two places at once ; but the practice has always been to take care that clients should be represented by some counsel in their cases and that counsel should adduce argument in support of these cases."

Lord Birkenhead's advice to lay clients on the subject is very helpful. He expressed his opinion thus when

writing in a London journal in 1925:—"Personally, if I became involved in litigation, the consequence of which were grave to me, I would infinitely rather be represented by A, a competent and industrious lawyer, who I know would not leave the court from the moment my case began until the moment it ended, than by B, who would at ten times the fee, enter the court to cross-examine a witness whose examination-in-chief he had not heard, or to reply to a speech which had unfortunately been delivered in his absence." Recently, both Mr. Justice Page and Mr. Justice Lort-Williams have commented upon the absence of counsel in the midst of a case. Apart from the fact that such conduct shows a strange want of respect for the court the client also suffers. Mr. Justice Lort-Williams made it perfectly clear that counsel must be present unless suitable arrangement could be made to continue the hearing in his absence. That is the English tradition and it should obviously be followed. (Legal Notes, Statesman, July 3, 1928). In *Bhagwan* v. *Jagar*, 101 I.C. 880 it was observed: "We are by no means satisfied with the conduct of a pleader who is engaged in a case and who is not present when the case is called out. It has been urged before us that in the district courts pleaders take up cases in many different courts and cannot be present in all the courts in which they are engaged when their cases come on for hearing. We do not consider that an excuse. They should either take up fewer cases or they should arrange with other pleaders to appear for them if they are unable to appear themselves."

A word about dress of advocates would not be out of place here. Lawyers in Bengal not enrolled in the High Court, were given the privilege of wearing gowns in 1915.

A form of dress long associated with the legal profession cannot fail to raise its prestige, but it is to be regretted that the privilege has not been generally appreciated. Members of the Bengal Civil Service (Judicial Branch) were directed to wear gowns in 1909, but they too have not been very mindful of their gowns. The trappings of a court-room and the costume specially meant for the Court and its ministers invest the Court with a sort of artificial dignity which is not without its effect. Even a Bohemian would agree that the same dress does not suit all occasions. The utility and necessity of ceremonial dress is recognised in every country. The gown is as necessary in Court as the trousseau of the bride in a wedding or other dress for special occasions. A judicial officer with shorts and shirt on must be a shocking sight to those who have respect for the traditions of the Bench, but Judges are seen in the mofussil Courts in such dress. In the old times members of the legal profession were known as "gentlemen of the long robe" on account of their costume. Jeffries, C. J., once said to a counsel: "You are a gentleman of the long robe and should have known better." (10 How. S.T. 91). In the High Courts, no one can think of appearing before the Judges without their gowns. To appear without gown before a robed Court is to show disrespect and the Court is entitled to refuse audience, be he a barrister or a pleader. Under the High Court rule "the wearing of the gown is compulsory" (Calcutta High Court, G. L. No. 4 of 4th April, 1915). The difference in the shade of the gowns should however be done away with and all gowns should be of black. Gowns should always be worn over a black dress or a dress of dark colour but this is very often disregarded in the mofussil courts. In England, formerly

besides the gown, the suit had also to be of black. It is said that Cockburn, C.J., once declined to give audience to a barrister who happened to be in grey trousers. In an observation which has become classical, Byles, J., once remarked that he listened with little pleasure to arguments of counsel whose legs were encased in light grey trousers. Matter of fact people would say, of what utility it is to wear a gown. They might as well ask, of what use it is to wish. It is however not necessary to wear a gown before unrobed courts, e.g., the magistracy.

"It has been held in England that not wearing proper dress is contempt of Court ; whether it would be contempt or not, there can be no doubt that it would not be proper to wear what is not regarded as proper dress. Perhaps we may take it as a rule for our guidance that the regulation dress should be worn, and I think—you may take it merely as my opinion—that a practitioner must be robed even when he has no business of his own, if he wishes to sit at the bar" (Professional Ethics, p. 120). Lawyers should enter the Court room with the gown on. It is improper to slip in the gown in the Court room when rising to address the Court. A Court is not a cloak-room. "Counsel cannot as a general rule, be heard in Court unless they are robed. Counsel robe in all sittings of the House of Lords, in all sittings in open Court of the supreme Court of Judicature, the Privy Council, the Mayor's Court, the country court, courts of quarter sessions, and other similar courts of record, and in committees of either House of Parliament. It is not necessary to robe in Judge's Chambers, or before arbitrators, or magistrates in petty sessions, or in Coroner's Courts" (Halsbury, Vol. II, para 649, p. 387). The dress other than the gown should be

neat and clean. Tidiness in everything is a virtue worth having. Smartness in a man manifests itself in dress, manner, speech and every thing. "Do not appear wearing a dirty shirt with a dirty soft collar when you have occassion to come to this Court" was the advice given to a barrister by Mr. Justice Walmsley sometime ago. The Judge read a homily regarding the proper dress of a counsel appearing in the High Court. The barrister in question fully appreciated the remark, blushed and bowed to his Lordship and hurriedly withdrew from the Court (*The Servant*). It is said that on some occasions Sir Lancelot Sanderson, C. J., noticing advocates in red ties or ties in flaming colours, called them to his chambers and pointed out the impropriety of wearing such ties in Court. As to the dress generally worn in the mofussil, the less said the better. It is sometimes difficult to distinguish who is a pleader and who is not.

As the High Court only prescribes the wearing of a gown over a coat or *chapkan* of dark colour and says nothing about leg-wear, some over-zealous people suddenly develop an instinct for strict and meticulous interpretation of the rule and contend that they are at liberty to wear the gown over the *dhoti* or any other dress of their own. This is not so much by way of revolt against trousers which are certainly not un-Indian but on account of a desire to strike something original however idiosyncratic it might be or to create discord where there ought to be none. Trousers or *pyjamas* though not of straight-cut English kind have existed as a sort of dress of honour in India from very ancient times and was much in vogue among Hindus and Mahomedans during the Mahomedan regime and before. They are even now very frequently

used by Indians of all nationalities on ceremonial occasions or state functions and even those who are not ordinarily accustomed to such leg-wear, resort to them on these occasions. The gown, it should be remembered, was prescribed at the request of the legal practitioners themselves. When the gown was prescribed, it was never thought for a moment that a question of leg-wear would arise as the customary dress for lawyers since immemorial time, has been trousers of one kind or other. Indeed, no rigid rule as to leg-wear or foot-wear is necessary in the case of members of a very old profession whose traditional dress is well-known. So, it was left to convention and good sense. For the sake of equality, decency and dignity, judges and lawyers are everywhere accustomed to wear the same dress and robe from the ancient times. It has a very wholesome effect on the outside public who feel that judges and lawyers are equal partners in the same cause viz., administration of justice and are entitled to equal respect. The trousers and the robe invest the lawyers with a dignity and honour all their own and confer on them a prominent distinction isolating them from the other members of the public. Apart from other considerations, it would not certainly enhance the prestige of the legal profession, if some of them insist on having a different form of leg-wear. In the case of an over-zealous lawyer, the High Court of Calcutta observed: "There is, it is true, no rule authorising Courts to insist on the wearing of trousers: they must rely on pleader's good sense to comply with universal practice." It is of course competent for the High Court to make a rule with respect to the wearing of trousers, but it is expected that so long as the gown exists, the legal profession will at least for

the sake of sartorial harmony and aesthetics stick to the traditional leg-wear of trousers without giving any cause for interference in a matter like this.

In this connection extracts from the editorial remarks of the Calcutta Weekly Notes (Vol. XXXIV, pp. 125, 126 notes) are reproduced below:—

"The feeling against trousers, however, seems to be wholly unreasonable. It is useful to remember that there are trousers of other than the European variety and there is no objection to their use. Trousers which cling to the legs in graceful folds are a purely Indian article and worn with *chapkan* or *achkan* and *choga* they would give a very pleasing appearance to any one with a passable figure. There is no rule or practice compelling the use of straight-cut English trousers and those who resent denationalisation in dress can easily reconcile sentiment and convention by getting themselves tailored in the Indian style.

"The conflict, therefore, is not between national and foreign dress, but between trousers and the *dhotie*. For a settlement it must perhaps be referred to sartorial aesthetics and we are of opinion that if the gown is to remain, it would accord very unsatisfactorily with the *dhotie*. The superfluous cloth worn from the waist in massed folds is bound to get mixed up with the gown and make a mess, with the result that a learned advocate dressed in that fashion would look more than an ungeometrical bundle of loose clothing than a neat and well-trimmed figure. If trousers are to be opposed, we are afraid the gown must be opposed olso. The reformers must then insist on something like the combination devised at the Benares Hindu University, *dhotie, chaddar* and *ushnish,* the latter two being of distinctive colours.

"It is doubtful whether any such reform would be worth while. There are certain sides of human nature which after all the centuries of enlightenment remain unenlightened. Shall we ever outgrow the primitive fascination for the picturesque in dress or cease to feel the inexplicable respect we do for the formal attire associated with certain callings and offices? At any rate we have not outgrown that weakness yet. The traditional robes

of the lawyer, as sombre as they are elaborate, do invest him with a peculiar dignity and give him a certain aloofness wherefrom his submissions come with added power. They also link him in a maner with the well-remembered celebrities of the profession who fought in the past against injustice and in vindication of right. Those robes, it seems to us, should be jealously stuck to rather than abandoned or varied. Nationalism is a noble feeling, but we do not see that trousers involve any violence to patriotic sentiment. Attempts made to get the robes or the dress that conventionally goes with the robes changed, seems to us to be inspired by an overzeal for which there is no sufficient justification."

At the annual dinner of the Hardwicke Society (1925) the Lord Chancellor in the course of his speech said:—

"He had never regretted for a moment, even when he was waiting for briefs, or even when he took silk and had to wait again for briefs, choosing the Bar as his profession. It was the most delightful of all occupations. It was all brain work and that in itself was a good thing. It was the best portal there was, he believed, to the House of Commons. And members of the Bar had also open to them other work in which they might, if they wished, stray at some time in their career. But, above all, there was this, that the Bar was a band of brothers. He believed there was no occupation in the world, in which the members were so friendly, so courteous to one another, so willing to be friends, and where the feeling of comradeship was more prevalent than it was in their profession."

The legal profession is an honourable calling and a high regard for the ideals and traditions of the Bar is bound to give inspiration to those who have chosen it. Every one having a knowledge of the conditions in the

mofussil is aware that there is less regard for these ideals than is to be found among the members of the Bar in the metropolis or in big towns. This appears to be the case everywhere. Walsh says in his "Advocate": "No practioner in England of the present day will deny that there is less *espirit de corps*, a lower standard of professional ideals, and more unconscious breaches of etiquette among members of the local Bars, than there is among men in the Temple." This is equally true of India. Local bars in mofussil stations are cut off from the centre of civilisation and culture and the want of the healthy and restraining influence of a well-disciplined bar is an obstacle to the growth of that spirit which every one would like to see in the legal profession. Social gatherings are almost unknown and lawyers and Judges seldom meet outside the precincts of the Court. Judicial officers marooned in outlying places find themselves in a difficult situation. There is less sympathy and still less company. There are little or no opportunities for exchange of ideas with the members of the profession and the result is that they do not understand each other. Things must be allowed to go on with the same laxity as before and a strict adherence to the rules of law or procedure is freely criticised and even punctual attendance in Court is resented.

CHAPTER VI.

OPENING THE CASE—STATEMENT OF FACTS.

On the day of trial, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case. The party beginning may then reply generally on the whole case (Or. 18, r. 2 C. P. C.). In Calcutta the following has been added to Or. 18, r. 2: —"Notwithstanding anything contained in clauses 1 and 2 of rule 2, the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin has not been concluded and may also allow either party to produce any witness at any stage of the suit." The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin. (Or. 18, r. 1). Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may

then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case (Or. 18, r. 3).

The above provisions in the C. P. Code summarise the law as to the right to open and close the case. The right to begin is in most cases an advantage to a party, for he gets an opportunity of making the first impression by stating his case. The benefit of this advantage is available only when he has a strong case. The party entitled to begin has also the advantage of a reply, if evidence is tendered by his opponent. But if he has a weak case, or slender evidence to adduce, the right to begin, not unoften proves a burden. As to the right to begin, Best says: "It is sometimes said that as the plaintiff is the party who brings the case into Court, it is natural that he should be first heard with his complaint; and in one sense of the word the plaintiff always begins; for, without a single exception, the pleadings are opened by him or his counsel, and never by the defendant or his counsel. But as is agreed on all hands, the order of proving depends on the burden of proof, if it appears on the statement of pleadings, or whatever is analogous thereto, that the plaintiff has nothing to prove,—that the defendant has admitted every fact alleged, and taken on himself to prove somthing which will defeat the plaintiff's claim,—he ought to be allowed to begin; as the burden of proof lies on him. The authorities on his subject present almost a chaos. Thus much only is certain, that if the onus of proving the issues, or any of the issues, however numerous they may be, lies on the plaintiff, he is entitled to begin, and it seems that if the onus of proving all the

issues lies on he defendant, and the damages which the plaintiff could legally recover are either nominal, or mere matter of computation, here also the defendant may begin (Best s. 637 ; see also Tay. ss. 378-384 ; Arch. Pl. 627-31). The right to begin is mostly determined by the rules of evidence relating to the burden of proof. These are to be found in ss. 101-114 of the Evidence Act. (See author's Evidence Act, 4th Ed. p. 622 *et seq*). A question may sometimes arise as to the onus of proof and the right to begin ; if there is argument for this, only one counsel on each side is heard (Hals. Vol. II, para, 685).

In most cases it is the plaintiff who has the right to begin and the plaintiff has therefore the right to open and close the case. The object of opening the rase is to state briefly the salient facts of the action, the substance of the pleadings, the issues involved and the evidence or the propositions of law by which a party intends to establish his case. The practice of opening the case is seldom resorted to in Courts other than the High Courts. What is usually done in the mofussil courts is that after the whole evidence is placed before the Court, first by the plaintiff and then by the defendant, the defendant's pleader argues the case and then the plaintiff's pleader combines in his address the statement of his case and argument. The judiciary in the mofussil is undermanned, and the principal reason which the judicial officers give for not insisting on the opening of a case is that they cannot afford to lose time over this matter. This is no doubt true so far as it goes, but the adoption of the practice will show that the time taken up in opening a case is never wasted or mis-spent. Sir Tej Bahadur Sapru in his note dated the 6th December 1922 appended to the Report of the Civil

Justice Committee (p. xxx) says: "They very seldom follow the Code of Civil Procedure in the matter of the opening of a case. They have inherited the notion from olden times that it is a waste of time to have a case opened by counsel. The result of this is that it is very seldom that one comes across a trial judge, who during the trial of the case knows precisely what the points at issue are and who can give decision on the spot as to whether a particular evidence sought to be introduced in the case is or is not relevant. I have come across a number of subordinate judges who are in the habit of disposing questions of relevancy or admissibility raised during the trial by the convenient formula "admitted subject to objection at the hearing." On various occasions strong objection has been taken by the High Court to this slovenly practice, but I am afraid it has had little effect."

It is a distinct advantage to have the case opened by the party who has the right to begin, before evidence is led. A knowledge of the facts or the points of law involved in the case and the issues to be decided, enables the judge to follow the evidence intelligently and to prevent at once the admission of irrelevant or inadmissible evidence. The Judge who starts to hear a case with ignorance of the facts and pleadings, must feel considerable embarassment. If he has to pick up his knowledge of the facts of the case from the evidence as it is unfolded, he will find himself in a quandary and realise his helplessness in preventing the introduction of matters which have no bearing on the points in issue. Much mischief will have been done, by the time he gets to the facts of the case and the whole procedure entails loss of time and protraction of the trial. A glance through the pleadings and a short opening

statement by the plaintiff's advocate will clinch the issues and the Judge will be in a position to keep the parties within the realm of relevancy. The sooner this is realised the better. I am aware that petty cases do not require opening; but in litigations involving complicated facts and debatable points of law, it is a distinct advantage to have the case opened.

It is important to create first impressions and this is secured by skilful opening of the case. The chief object is to create a favourable opinion of the case at the first opportunity. Preparation is the foundation of good advocacy and the importance of preparing the facts has already been discussed in a previous chapter (*ante* p. 41). An advocate can never open a case in an impressive manner unless he has himself a clear idea of the facts and builds his own theory on it. Judge Miller of America says: "The counsel whose duty is to make the opening for his side of the case should have a clear theory of that case—a theory around which he should group all the facts which he admits as established for the other side, and those which he relies on as proved by his own." "To enable the Judge or the jury to understand fully, and appreciate correctly, the force and value of the more elaborate argument, it is necessary, in the first instance, to give a clear view of the aspect of the case, of the matter to be decided, and of the elements of which that decision must be composed. The object is not successfully attained either by the announcement that certain abstract questions of law are necessary to be decided in the judgment to be rendered, nor that certain items of evidence will be introduced" (Rhetoric as an Art of Persuasion). The statement of the case should be brief and should lay bare the outlines of the

case with precision and perspicuity. It should not be inordinately long, nor should it be spattered with arguments. To ensure quick appreciation, the main facts should be arranged in orderly succession and emphasis should be laid on the strong points. One strong point is better than ten doubtful ones. The presentation should be such as to arouse interest in the case. The chief thing is arrangement, order, precision and lucidity. A clumsy statement of facts will create the opposite of what you intend to accomplish, *viz.*, an unfavourable opinion of your case. A misstatement of facts, an inaccuracy, a single false step, will mar your object and confuse the tribunal. Judge Dillon says that "a case ought to be opened leaf by leaf, as a rose unfolds." Repetition or irrelevant facts should be carefully avoided and the principal facts should be mapped out accurately and the line along which you intend to travel should be made plain. Bear in the mind the issues and the evidence which will substantiate them and this will clarify your ideas. Never exaggerate facts or indulge in high-flown language. State your case in the simplest possible words with all the earnestness that you can command. An opening is not intended to be an elaborate production. What is needed is a simple narrative of facts in as few words as possible, giving an idea of the exact nature of the case. "Counsel in opening states the facts of the case, the substance of the evidence he has to adduce, and its effect on proving his case, and remarks upon any points of law involved in the case Counsel may in opening refer to those facts of which the Court takes judicial notice. Neither in the opening nor at any stage of the trial may counsel give his own personal opinion of the case or mention facts which require proof,

but which it is not intended to prove, or which are irrelevant to the issue to be tried." (Halsbury, Vol. II, s. 685).

As a rule, an advocate should not in his opening statement worry himself with the case of his opponent by anticipating defence. He may have a knowledge of the defence as disclosed in the pleadings, but he has no idea as to how would the case be presented, or on what points would his adversary rely. There are no doubt cases in which some advantage may be gained by anticipating a defence and attempting to break it down. It is not a bad policy to take the wind out of the sails of the opponent, if it can be successfully done at this stage. But in the majority of cases, it is injudicious to anticipate defence when opening the case. The opponent will in due time present his case and indicate the lines of defence and plaintiff's advocate can then offer blows. There may be facts favourable to the opponent, but if the defence be anticipated, there is a great likelihood of their being brought to prominence while presenting plaintiff's case. This procedure not unoften stands in the way of creating a favourable impression of plaintiff's case, which is the principal object of opening the case. If it is at all necessary to state facts favourable to the other side when opening plaintiff's case, it should be done fairly, but care must be taken that the facts favourable to the plaintiff are not put in the background. The opening statement of plaintiff's case is intended to make a favourable impression and so an advocate cannot be charged with unfairness, if facts unfavourable to him are not touched in it. It professes to be the statement of one side only. The other side will have his turn and his case will then

be presented in the best possible manner. The questions of fact and law should be stated briefly and clearly. Cox says: "Then taking each of these questions in turn, state in the form of narrative the proofs you propose to produce in order to its establishment; and in so doing be very careful to show no misgivings about it by anticipating objections, apologising for defects, or making an effort to give weight to certain witnesses, for you must assume that they are unimpeacable until they are shaken by your opponent, and their testimony to be conclusive until it is shown to be otherwise" (Cox's Advocate). "The best authorities are not agreed as to whether an advocate should anticipate his opponent and state the arguments which he will probably make, or refrain from doing so. Both methods have their advantages and their disadvantages Charles James Fox, one of the most accomplished debaters of modern times, was accustomed to state the arguments of his adversaries with greater strength than they could state them and then demolish them, but the course is not always wise especially in the opening statement, for an advocate may state something which would not have occurred to his opponent" (Hardwicks, p. 39).

Lord Abinger says that he made "it his business to open the case in the shortest and plainest possible manner, with no other object in view than that to make the jury comprehend the evidence which they would shortly hear." When opening a case the facts intended to be proved should not be overstated. Apart from the confusion and the loss of time this procedure involves, it is likely to create the impression that the advocate gives an undertaking to improve everything that is stated by him and when the proof does not reach this standard, it creates

an unfavourable impression on the minds of the judge or the jury. So, one should not be lavish in his promises when opening his case and it is better to understate than overstate. Failure to fulfil his promises will furnish the opponent an occasion for unfavourable comment and enable him to level the charge of unfairness. Too much reliance should not be placed on statements of witnesses when opening a case, for many of them tell falsehoods which they cannot adhere to at the trial.

Lord Brougham in his defence of Queen Caroline, commented with great effect upon the opening statements of Gifford, the Attorney-General, who had stated much too strongly the evidence of adultery which he said he would introduce against the Queen. The adroit advocate thus comments upon the discrepancies mentioned:

"He meant to point out the parts of his learned friend, the Attorney-General's opening statement, which, instead of receiving support from the evidence, were either not touched upon by it at all, or actually negatived out of the mouth of his own witnesses."

"Their Lordships would perceive that every one of these assertions in his learned friend's speech rose one above the other in successive height, according to their relative importance, and even the lowest of them it was of essential importance to sustain by evidence for his case. But every one of them he not only failed to prove as he promised to prove by evidence but he actually negatived some of the most material of them by the witnesses whom he had produced at the bar, evidently for the purpose of substantiating them. When the witness Demont was at the bar, he repeatedly asked her respecting these parts of her statement, but she who was destined to tell them all,

denied any knowledge of where the Queen went to on that particular night alluded to. She denied that she knew where the Queen went after she left her bed room" (Hardwicke, pp. 35, 38).

Some men are of opinion that the opening statement is of greater importance than the closing argument. Judge Miller says that "not one lawyer in twenty can state a case neatly, logically and compactly."

Sir James Scarlett's (Lord Abinger) preparation and method of opening contributed much to his success at the bar. He says:—"I made it my business to know and remember the principal facts, to lay the unimportant wholly out of memory ; to open the case, if for the plaintiff, and when I expected evidence for the defendant, in the shortest and plainest manner, with no more object than to make the jury comprehend the evidence which they should shortly hear. I very seldom thought it necessary to make any anticipation of the defendant's case. It is, indeed, often times dangerous to do so, as it leads the judge and jury to seek for support to it in the plaintiff's evidence. I found from experience, as well as theory, that the most essential part of speaking is to make yourself understood. For this purpose it is absolutely necessary that the Court and jury should know as early as possible *de quâ re agitur*. It was my habit, therefore, to state in the simplest form that the truth and the case would admit, the proposition of which I maintained the affirmative and the defendant's counsel the negative, and then without reasoning upon them, the leading facts in support of my assertion. Moreover, I made it a rule in general rather to understate than overstate facts I expected to prove. From these remarks it will appear that my success did

not in the least depend on those tirades of declamation which make the reputation of a speaker. Not in the most considerable and difficult cases in which I have carried the verdict, can any one who reads the printed speech either take any interest in it, or even understand it without reading over and understanding the whole evidence."

"In his opening speech the advocate should be careful not to expiate at length upon the weak points of his own side, nor dwell long upon the strong points of his adversary. He should also be careful not to go outside of the record, as many advocates do in their opening speeches, for the judge or the vigilant opposing counsel will ask him to confine himself. We once heard Mr. Joseph H. Choate ask his adversary not to *testify* himself, but to allow his witnesses to do so for him. Every time an advocate is corrected in this way, he is injured in the estimation of the jury. The jurors think it an attempt to bring something into the case that should not be brought in, for the purpose of deceiving them, and they resent it accordingly" (Hardwicke, p. 48).

The following illustration from Cox's "The Advocate: his Training, Practice, Rights and Duties" will show how to open a case in short and intelligible language. The rules stated by him with respect to the 'opening' are admirable. They contain invaluable instructions and some extracts are given below:—

" 'Gentlemen of the jury,—In this case John Doe is the plaintiff and Richard Doe is the defendant. The action is brought to recover damages for a trespass by the defendant upon certain premises of the plaintiff, in Ide, with county of Devon. The defendant has pleaded: (1) That he is not guilty of the trespass; (2) That he

entered the premises in question by leave and license of one James Brown, who was the tenant in possession of the said premises. To the second plea the plaintiff has replied that said James Brown was not in lawful possession of the premises, nor entitled to give such leave and license, and these are the questions you have to try.'

"A statement somewhat in this form might be made with equal ease, however various, complicated, or technical the pleadings, and indeed, some such sketch of it must have been drawn in the pleader's mind, or set down upon his notes, before he put it into technical form.

"As a general rule, the statement of the case for the plaintiff should be calm, temperate, and dignified ; orderly in arrangement, lucid in language, and as brief as the facts to be told will permit. Remember that a plaintiff is supposed to come into Court to demand redress for a wrong done to him : he is there of his own will, invoking the aid of public justice to procure compensation for his private injury. You cannot more effectually awaken a sympathy for your wronged client and indignation against the wrong-doer than by a simple description of the injury and a careful abstinence from angry comments, personal abuse, and other indications that revenge rather than redress is the plaintiff's object. An orderly and lucid statement of the case, keeping as closely as may be to the order of time in the relation of events, is almost always desirable ; because a plaintiff, who is the mover in the action, and comes voluntarily into Court, may be supposed in most cases to have the right on his side, and always to have some probable foundation for his claim. So that it is very rarely his policy to throw a fog about the case.

"You will begin, of course, with an account of the

parties, who and what they are and the circumstances that led to the present dispute ; then you will state with precision the nature of the dispute itself, and whether it is upon a question of law, or of fact, or both, with the very points at issue,—the one for the information of the Court, and the other for the information of the jury, that attention may be directed more readily and surely to your evidence as it bears upon these points. Of so much importance is this that you should take some pains by previous preparation to put them into the most distinct shape, and you should repeat each one *toidem verbis*, whenever you introduce your statement, and when you close the evidence that bears upon it. Then taking each of these questions in turn, state, in a narrative form, the proofs you propose to produce in order to its establishment, and in so doing be very careful to show no misgivings about it by anticipating objections, apologising for defects, or making an effort to give weight to certain witnesses, for you must assume that they are unimpeachable until they are shaken by their opponents, and their testimony to be conclusive until it is shown to be otherwise. If you display the slightest doubt about your own case and your own witnesses, they will be at once suspected to be far worse than they are, they will be heard with a prejudice against them, and small errors which, unsuspected, would not have been noticed, are instantly enlisted to confirm this foregone conclusion. Hence, too much emotion, too much anxiety, too much elaboration, and too much effort, in an opening speech, are calculated to damage the cause, by exciting a suspicion that it is not so good a one as it should be. And then it becomes a difficult task to combat a prejudice

as well as to convince. You should reserve your energies and your eloquence for the *reply*.

"Now to make any narrative clearly intelligible, the first care is to observe, as closely as possible, the order of time in detailing the events. You will commence, of course, with a description of the parties, who and what they are, with the addition of any circumstances in the position of either of them which may affect the case by explaining subsequent transactions, or aggravating the damages. If locality is in any way concerned, describe the *locus in quo*, and, if possible, in all cases use a map for this purpose. The rudest drawing of a place is more intelligible than any verbal description ; and it has the still more important use of at once arousing, and fixing upon the story, the attention of the jury.

"Having described the person and the place, take up your narrative at such period preceding the immediate matter in controversy as may be necessary to explain the cause of it, to use a legal phrase, begin with the inducement. Show how it was that the conflict arose. Then describe minutely, with careful reference to the plan, if there be one, the subject matter of the dispute, and the precise questions which the jury will have to determine in relation to it. This done, you will proceed to state your case, the facts and arguments upon which you rest your claim to the verdict. Advocates do not always make this statement in this part of their opening. Often they reserve it for the close, preferring first to state their evidence. But consulting, as before suggested, one's own mind for the manner in which conviction is most readily produced, it appears that, to make the account of the evidence easily intelligible, it is necessary to have such a previous view of

the facts as might enable us to discern the bearings of the promised testimony. We would, therefore, earnestly recommend you to adopt, as an invariable rule of your practice, the plan of preceding your statement of the evidence with a succint narrative of the facts and the arguments you found upon them, briefly set forth, and then to proceed to describe the testimony by which, as you are instructed, you will establish those facts.

"This accomplished, and not before, you should proceed to state the particular evidence by which you propose to establish the facts you have detailed ; and in arranging your statement you will often have this difficulty to encounter—the same witness will sometimes speak to different parts of the transaction, and the question occurs whether it is the better course to deal with the whole testimony of the witness at once and dismiss him, or to confine the statement to so much of it as comes in order of time and introduce him again when he is wanted. But this often recurring source of perplexity will be entirely removed by observance of the arrangement above proposed. Having stated, in a narrative form, the whole story intended to be proved, with the argument founded upon the facts, apart from any particular proposed proofs, and the jury being thus already in possession of the facts and their mutual bearings, all that now remains for you to do is to introduce to them the persons and documents by which you hope to establish the case you have already painted upon their minds.

"In concluding your opening, it is rarely prudent to do more than briefly repeat the outlines of your case and especially so much of it as goes to aggravate damages, winding up by a calm assertion of your confidence that

if you establish the case you have stated, you will be entitled to their verdict. Anything in the shape of a formal peroration, and especially any display of eloquence at the close of an opening, is out of place and in bad taste, and only permissible in a few exceptional cases, of which it must be left to your discretion at the moment to determine."

At the risk of repetition it may be said that an opening statement should contain a brief but lucid statement of the facts constituting the case of action without going into details, the substance of the pleadings, the points in issue and an indication of the evidence by which they are to be established and remarks upon points of law involved in the case. This statement though short must be comprehensive enough to cover the entire ground, and big cases involving complicated facts or technical matters must necessarily require a long opening. The defendant has a right to require that the opening statement should be such as to give an indication of the case he will be asked to meet. As Judge Miller says: "The propositions of law and fact on which counsel rely must be stated so as to show clearly their relation to each other, and be so plainly expressed as to present a chart of the road to be traveled, without a map in detail of the country through which that road is to go." The leading purpose is to prepare the ground and to create a favourable impression. Argument should be avoided at this stage and defence should not be anticipated as a rule. Harris advises against "arguing too soon" and says that "another advantage from not arguing too soon will be, that your adversary will not be able to turn your arguments against yourself, or to adapt his own in accordance with your theories. In other

words, you had better obtain some knowledge of your opponent's hand before throwing away your best cards. (Harris' Advocacy, p. 9).

The following rules with regard to the statement of the case are taken from an American book "Work of the Advocate" (1888 Ed. p. 207) by B. K. Elliott and W. F. Elliott. The fundamental rules as to 'opening' enacted by them are bound to prove very helpful:—

1. The opening of counsel should ordinarily consist of a comparatively brief statement of the nature of the action, the substance of the pleadings, the issues to be tried, and the facts expected to be established.

2. Counsel should not be permitted to rehearse the evidence at length, but should be confined to the statement of the facts, and only such facts, as a rule, as may fairly be shown under the issues.

3. The limitation and regulation of opening statement must rest largely in the discretion of the trial court, subject however, to the revision power of the higher court for abuse thereof.

4. Where counsel exceeds the proper limits in opening, an objection should be made, and an exception taken to the ruling of the trial court, in order to present the matter on appeal.

5. Counsel in his opening statement, should be careful to base his action or defense on a tenable theory, and to state his entire claim.

CHAPTER VII.

OPENING DEFENDANT'S CASE.

Opening the defendant's case is quite different from opening the case for the plaintiff and often requires greater skill and fortitude. When it is the defendant's turn to state his case, the plaintiff has had already the advantage of first impression and has also adduced the evidence in his possession in support of his action. It seems that the forces are all up against the defendant, and he has little chance left. The prospects look gloomy, but the advocate who has not held the first brief, will have during the progress of the suit taken a rapid review of the whole situation and formulated his plans of attack. He has one advantage of which he can take full benefit. Plaintiff has laid bare his case and has also produced his evidence ; his witnesses have been subjected to a cross-examination and this may has elicited some facts in favour of the defendant. His witnesses may have been discredited or broken down. The defendant's advocate can now alter or shape his defence by making the best use of the materials at his disposal. In his statement of the defendant's case, the advocate can supplement these materials by offering suitable arguments, a procedure not generally resorted to when opening the plaintiff's case. When offering arguments, the reply that the plaintiff may give should be reckoned with and he must anticipate it to the best of his ability. He cannot remain satisfied unless he has made every supposition that

could be brought against his argument. The evidence and and facts in favour of the defendant are held in reserve and at this stage it may be sometimes possible to dispose of some of the facts in plaintiff's favour by assuming them to be true and arguing upon them. He can then begin the attack by bringing the facts in his favour. The main object of the defendant's lawyer is to demolish the plaintiff's case and to build his own. He will therefore do well first to attack the plaintiff's case by dwelling on its inherent improbability or inconsistency or picking out all the flaws than he can think of at this moment. He will find enough materials for this from the plaintiff's case as stated and the evidence adduced. There may be a many gaps between plaintiffs promise and performance. His own case, if he has set up one, although it might appear strong to him has got to be established and so long as this is not done, he can not feel any security in regard to his position. It may not be possible to prove it, or any rate to establish as satisfactorily as he had intended to do on account of the break-down of witnesses or paucity of evidence or any other adverse circumstances. But before he embarks upon the task of establishing his own defence, he must take the fullest advantage of the weakness of his adversary's case bearing in mind that the onus is generally on the plaintiff to prove his case and prove it to the hilt. The man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not the want of right or weakness of proof in his adversary (*Midland Ry. Co.* v. *Bromley,* 17 C. B. 372 ; *Doe d Walsh* v. *Langfield,* 16 M. & W. 497). When the issue raised in substance is whether plaintiff's or defendant's story is true, it is pos-

sible that neither of them may be true. The question then arises which of the two alternatives of the issue is the really material one. Usually the really material one is the first part of the issue—Is the plaintiff's case true? If the defendant's defence is a plea in confession and avoidance, viz., a plea which admits that the plaintiff's story is true but avoids it, then if the defendant fails to prove his case, the plaintiff may recover. But if the defence is substantially an argumentative traverse of the truth of the plaintiff's story, not admitting that one word of it is true and setting up things perfectly inconsistent with it, the second alternative of the issues ought to be rejected and the truth of the plaintiff's story becomes the real question. If the plaintiff does not prove the affirmative of his issue, the consequence is that he must fail, and the defendant may say, "it is wholly immaterial whether I prove my case or not ; you have not proved yours" (*Chandranath* v. *Ramjai,* 6 B. L. R., 303, 307 : 15 W. R. 7 P. C.).

Harris says: "The first point to decide is at what point to commence the attack. A great deal may depend upon this. You may expend much energy in fruitless work. The weak places are undoubtedly attractive, but, as a rule, should be reserved, because at a later period the effect will be greater and the demolition *appear* to be more complete. Attack, therefore, the strong points first, but not by direct blows. You cannot knock down a substantial wall by butting your head against it. There are improbabilities and inconsistencies, perhaps, or partialities to deal with. You may possibly get these and shake the very foundations on which the whole fabric rests."

(Harris' Advocacy, p. 162). To continue his advice:—"Having disposed of the weaker points of your opponent's case and attacked the strong ones by well arranged argument, the next duty will be to present your own facts, and in doing this the great rule to observe is to *arrange them with due regard to probabilities.* This is not always done; it is sometimes not even thought of. The same facts may be so ill-arranged, that collateral circumstances (never to be lost sight of, though irrelevant as evidence) may raise the strongest improbabilities against you. On the other hand by a skilful arrangement the opposite result will be produced." (Harris' Advocacy, p. 166).

The defendant's advocate will then introduce his own evidence. The statement of facts and the introduction of evidence in the speech should aim at the object of making the theory of his case probable. There must be a clear idea of the theory of the case and the line of defence to take. Facts should not be heaped together without an eye to order, nor should propositions of law be formulated obscurely. Confusion is certain to produce that weakness which is fatal to success in a case. The intention is to mar the effect of the favourable impression created by the opening speech for the plaintiff and to bring forward prominently the forces of defence. Facts should be stated in an orderly manner with due regard to their connection with surrounding circumstances. Facts should be made to follow in their natural order. The skilful selection and arrangement of facts should have one object in view *viz.*, to establish the conclusion of probability. Before admissions are made, their consequences should be carefully weighed.

As to how to begin defendant's case and what state-

ments should be made in the opening, I cannot do better than quote again from Coxe whose rules on the subject contain admirable suggestions :—

"The plaintiff's case being closed, that of the defendant begins. You will open with an address to the jury in which you comment upon the case, as disclosed by the plaintiff, and state the case which you propose to produce in answer to it.

"Herein does it differ materially from the plaintiff's opening, for whereas his counsel properly confines himself to a statement of the facts, reserving commentary for his reply, the defendant's counsel must perform the double duty, and combine the spirit of a reply with the calmness and clearness of an opening. It is his single opportunity for addressing the jury, and he must use it to travel over the whole case, with comment, not only upon that which has been proved, but also that which yet remains to be proved, and which may or may not answer to his anticipations.

"Hence the difficulty of a defense. It is usually said that a reply is the test of ability ; and so it is in *debate*. But the saying has been inconsiderately extended to forensic oratory, in which the circumstances are very different. In debate there is no necessity for anticipating the production of facts, which may not be proved after all, and dealing with them as if proved. To answer the argument on the otherside, and urge his own reasons, are all that devolve upon the debates. But at the bar the counsel for the defendant must do all that the debater is required to do, with the additional difficulty that he must state a case that will be an answer, and yet must state it so that a failure in proof of parts of it shall not

be destructive to the whole ; for one of the first lessons of experience in advocacy is the little reliance to be placed on *instructions*, not from any fault of the attorney, but because witnesses, from many motives, are wont to make to the attorney in his office a statement very different from that which they will venture, under the sanction of an oath, with a cross-examination in prospect, and with the eyes of the public upon them.

"As a general rule it may be desirable to treat your subject in its natural order, that is to say in the order in which it has been already presented to the minds of the jury, unless some special reasons exist for dealing with it otherwise.

"Bear then, this in mind, when you rise to open a defence, that you are about to comment upon a story already known to the jury, that it is your business to convince them that this story is not credible, by reason either of its own intrinsic improbabilities, or of the insufficiency of the testimony by which it was supported, or of the little faith due to the witnesses, or of the contradictions which you purpose to produce. In order to remove the impressions made upon their minds by that story, you must ask them to review it with you and to do this, you must recall it to them ; and as we have sought to show you, it can best be recalled in the order in which it was imparted to them. Then occurs another question, upon which there is some difference of opinion, even among experienced advocates, namely, is it more prudent to recall the whole of your adversary's case, its strongest as well as its weakest parts, that which you cannot answer as well as that which you can ; or, to pass over that which tells against you, and to dwell exclusively on that

which you can meet? On the one hand, it is said that, by reviewing the strong points, and leaving them unassailed, you not only recall what may have been unnoticed, but you give them double significance by the confession of their strength, implied in the inability to answer them. On the other hand, it is argued that not to notice them at all, is to admit them to be unanswerable and destructive, and thus to concede a victory.

"This is a dilemma of such frequent occurence that we should have been very glad if we could have discovered any rules for guidance in the choice. But we have endeavoured in vain to do so. Even after the experiment has been made, and with reference to the results of actual experience, we are unable to say which course has the balance of reason or the proof of practice to recommend it. Much must depend upon the particular circumstances of the case, upon the impression apparently made upon the jury, upon the nature and worth of the answer you are about to put in.

"As a general rule, it will be the more prudent course to begin with a review of the case as disclosed by the plaintiff, and then to state your own case ; but to this there will be exceptions under special circumstances, some of which we will notice presently. Take the story as it was told, not strictly observing the order of witnesses, but rather the order of time. A favorite and often very effective opening of a defense is an allusion to the highly-colored assertions of the counsel for the plaintiff as compared with his proofs ; for seldom, indeed does the sifted evidence quite fulfil the promise of the opening. Reminding the jury of this, you disturb their confidence in the case already submitted to them, and you conciliate

their good-will to give you, who appear as an injured party, at least a fair hearing.

"Then travel carefully through the case, restating it with your own comments, and according to your own view of it, thus presenting it under a different aspect. Take care that no weak part of it escapes your notice. Point out its shortcomings. Show not only the worthlessness of what is proved, but show how much more might and should have been proved. Of nothing does a skilful advocate take more advantage than of omissions of evidence, and nothing is more telling with the jury to the disadvantage of the party so complained of; a motive for withholding the witness is always, and not unreasonably, suspected, and of that suspicion it is permissible to avail yourself. Then you must show, if you can, that the evidence upon which you are commenting does not bear the construction intended to be put upon it that may occur to you.

"But observe that, in the performance of this portion of your task, great caution will be necessary on your part to proceed upon substantial grounds, and only to put forward objections that have some show of reason and good sense in them. Criticism that is obviously frivolous will recoil upon yourself and damage you much more than your adversary.

"Another very important rule is, not to perplex the jury with too many defenses. Even if you have many answers, it will be your truest policy to take the strongest and best, and rely upon that, or, at most, upon two or three, if they be very conclusive: but let it be an inflexible answer with weak and subtle ones. One in a thousand times you may lose a cause by omitting to bring forward some

other weak defense, after having thrown yourself upon your strong one ; but for one that this is likely to happen, you will twenty times lose the verdict your strong defense would have secured, had you not weakened it by tacking to it some other more refined, and, therefore, less intelligible one.

"The art of a defense consists in battering down your adversary's case, and erecting your own upon its ruins. This shows you the proper order of your strategy You must first attack the case on the other side, and shake it to its foundations before you atempt to lay the foundations of your own. Yet, apparently obvious as is this policy of a defense, how often is it neglected ; and the listener in our Courts will hear the attack and the defense, the facts that have been asserted and those that are to be proved, mingled in the speech to the detriment of both and to the perplexity of the jury. Pray you avoid it. Spare no pains for the weakening of your adversary's case, by making plain to the jury every flaw in it your ingenuity can find. Never neglect this portion of the duties of a defense, for you know not what may be its value, if it may not be your reliance at last. This, at least is yours ; of such advantage as can be had from it you are certain ; nothing can deprive you of that. But your own case, however apparently strong, is never secure until it is proved ; it may break down at last, from circumstances you could not anticipate nor control, and then your only hope will rest upon the damage that has been done to the case of the plaintiff. Remember that it is upon the other side that the onus of proof usually lies. It is for the plaintiff to make out his case to the satisfaction of the jury, and if he fails to do this, even although you may

be equally unable to prove what you had expected to prove, still you will be entitled to the verdict. Therefore it is that a sagacious advocate always, in defenses, throws his whole strength into the attack, and permits no weak point, in the sum or in the details of proof, to escape his criticism. He will labor at this, while often he will pass lightly over the evidence he proposes to produce on his own part, leaving the latter to tell its own tale, if it is strong, and covering its defects if it is weak.

"In commenting upon evidence, you may criticise either the evidence itself, or the witnesses or both. You may take the case either in the order the witnesses were examined, or in that of time, according to the story. The latter is perhaps the more intelligible arrangement for a jury. You will be guided by circumstances in your choice, each case having its own considerations in this respect, which no general rule could anticipate.

"In dealing with the evidence of witnesses, your sagacity will be exercised in detecting and exposing contradictions, improbabilities, and statements are variance with the evidence of other witnesses. No portion of the duties of an advocate opening a defense are so effective as this.

"You will now proceed to open your defense; to state what is the answer you are prepared to put into so much of the plaintiff's case as requires an answer. In your commentary upon it you have shown what of it was untenable, what unproved—what had, in fact, answered itself. You have now to show the means by which you propose to defeat by evidence that which you were unable to beat down by argument.

"Here, also, your task is more delicate and difficult than that of the counsel who opens a plaintiff's case. Great caution is required; some tact is to be exercised; your judgment must be ever on the watch to control your tongue. You must be careful to state no more than you are confident of being able to prove; you must avoid unnecessary proofs—by which we mean, the proving of that which is not denied, or not relevant, or which is already established by the witnesses on the other side; for an unnecessary witness is always dangerous; once in the box he is equally the property of your opponent, and you cannot know what damaging facts may be obtained from him in cross-examination. It, on the other hand, you refer to him in your speech, and afterwards omit to call him, you expose yourself to put the worst construction upon this discrepancy between promise and performance. In stating your defense, if it is a strong one, it is desirable briefly to recall the parts of the plaintiff's case to which it is an answer, by which you impress it the more forcibly upon the jury; and this should be done, not by stating all of the plaintiff's case at once, but each part of it that you refute, in succession, with the answer following immediately upon the fact; for juries cannot pursue a train of argument, nor even carry in their minds many successive facts, so as to apply a succession of other facts to those which have preceded.

"And your statement of facts—that is, the opening of your defense—should be, like all statements of a case, plain, perspicuous, and unimpassioned, but also pictorial and dramatic. There must be no effort to be oratorical, no flights of eloquence of poetry, no appeal to the passions—only mere narrative, told in the language most intelligible

to unlearned ears, delivered in a conversational tone, and in the manner of one telling a story.

"Having concluded the statement of your case, you will then proceed to make application of it to the case of the plaintiff, showing how triumphantly it will answer this point, how it will demolish that one, how little remains unshaken, and how worthless that little is. Here it is permissible to be somewhat discursive ; to call in the aid of any acts of oratory that may be apt to the occasion, for the purpose of yet more damaging the case of your opponent or invoking a favourable opinion of your own.

"Not the least of the difficulties you will feel is to decide the best manner of dealing with so much of the plaintiff's case as you are able to answer only partially and imperfectly. That it is that will test your tact and discretion. The parts to which you have no answer you will of course pass unnoticed. But the most cautious discretion is requisite to determine if, and how, you shall deal with facts to which you have not a satisfactory answer. It is impossible to suggest any rule for your guidance in these circumstances. You must rely upon your own tact at the moment, to determine you how to treat them. This is an art which experience alone can teach, and we cannot do more than remind you of the existence of these difficulties, and of the capacities that will be required of you to meet and overcome them.

"Having concluded your speech, you proceed to call your witnesses."

CHAPTER VIII.

ARGUING THE CASE—ADDRESS TO THE COURT.

After the parties have closed their case and all evidence, oral and documentary, has been put in, the contest has reached the final stage. The advocates should then address the Court on the whole case in the order stated in Or. 18, r. 2 of the C. P. Code. If the plaintiff has opened the case, defendant argues first and the former has a right of reply. If the defendant has adduced no evidence, plaintiff argues first and the right of reply is in the defendant. This right of reply is a valuable right, as it offers the last chance of turning the scale in favour of the party, although the odds may be against him.

"If a point of law is raised at any stage, all the counsel on each side may be heard, but in practice it is not usual for more than two counsel on each side to argue. The leading counsel present for the side on which the point is raised has the right of reply. If in replying he cites new cases, one counsel on the other side is allowed to observe on those cases. On questions of fact, only one counsel on each side is heard." (Halsbury, Vol. II, para. 687).

"When all the witnesses for the party who begins have been called, his counsel intimates that his case is closed, and the counsel on the other side may then submit that there is no case to go to the jury.* If the counsel

* In England civil cases also are tried with the help of jury.

on the other side does not announce his intention to adduce evidence, the counsel for the party who begins may address the jury a second time for the purpose of summing up his evidence, but he cannot do this if the judge holds that there is no case to go the jury. Counsel for the party who does not begin will not be allowed to try to elicit from the jury an expression of opinion whether they desire him to call evidence, nor, after the counsel for the party who begins has summed up his evidence, will counsel for the other side be allowed to change his mind and adduce evidence. It counsel for the party who does not begin calls no evidence, he has the last word, except where the Sovereign is a party to the record, in which case either the Attorney-General or the Solicitor-General, by virtue of his office, can claim a right of reply. If counsel for the party who does not begin cites a case, but calls no witnesses, counsel for the party who begins has a right to observe on the case cited. If counsel for the party who does not begin opens facts to the jury and calls no witnesses, the judge may allow a reply to the counsel on the other side." (Halsbury, Vol. II, para. 688).

"When counsel for the party who does not begin announces his intention to call witnesses, then on the close of his opponent's case he opens his own case, and comments on the evidence that has been given, and states the effect of the evidence which he proposes to adduce. The witnesses are then examined, cross-examined, and re-examined, and he sums up his evidence.

The counsel for the other side then replies generally on the whole case. If the counsel for the party who does not begin opens a defence on the facts and also relies upon a legal objection and after citing cases in support

of his objection, calls witnesses to establish the facts, he is entitled to a reply on the matter of law after the general reply of the counsel on the other side." (Halsbury, Vol. II, para. 689).

Co-plaintiffs must appear by the same counsel, and cannot sever their case. Co-defendants may be represented by different counsel ; and if they are so represented, it is in the discretion of the judge to decide how many counsel will be heard. Where the interests of the defendants are the same, the Court will not allow more than one cross-examination of the plaintiff's witnesses, or more than one address to the jury. The defendants' witnesses will be examined by the different counsel in the same manner as if the defence were joint and not separate, but different counsel will be heard for each defendant on a legal objection."

"Where several defendants appear by different counsel and have different interests, counsel for each defendant so appearing will be allowed to cross-examine the witnesses on the other side and to address the jury. It is in such a case in the discretion of the judge to say in what order the defendants are to cross-examine witnesses and the jury. The order generally followed is that in which the defendants' names appear on the record."

"If one defendant calls witnesses and another, who is separately represented, does not, counsel for the defendant who does not call witnesses can only address the jury once, namely, in general before the witnesses for the other defendant are examined. If the evidence which it is proposed to give on behalf of one defendant is hostile to the interests of the other defendant, counsel for the

defendant who does not call witnesses may be allowed to address the jury after the evidence has been heard for the other defendant. Where witnesses are subpoenaed by two defendants with different counsel, only one examination-in-chief of these witnesses will be allowed. Where defendants are separately represented, counsel for one co-defendant may cross-examine the witnesses called by a co-defendant. Where co-defendants are more opposed in interest to one another than to the plaintiff, permission may be given to each defendant or set of defendants to open and prove their cases separately as well as to cross-examine each others' witnesses." (Halsbury, Vol. II, para. 690).

A case is argued with the sole object of securing the verdict and an argument is but the means to achieve that end. Inspite of the briefs and all facts upon the record, oral argument is absolutely necessary in order to understand the case thoroughly and to come to a proper decision. Judge Dillon says: "As a means of enabling the Court to understand the exact case brought thither for its judgment, as a means of eliciting the very truth, both of law and fact, there is no substitute for oral argument." Eloquence is certainly of inestimable value in pursuading a tribunal, but the faculty of putting things with skill and tact is of greater importance than barren eloquence. Given the same facts, two men may explain them in quite different ways—one will produce conviction in the fewest of words, while the other will fail to arouse attention even if he talked longer. It is superfluous to say that as during the trial the advocate should be courteous and respectful while addressing the Court. On no account should he lose temper or exhibit impatience. If there is

anything to protest against, he must do it firmly but respectfully. Rulings of the Bench should be accepted with a good grace. A calm unruffled temper at all stages of a trial is one of the essential qualities of a good advocate. His demeanour should also be courteous and conciliatory. He should take the utmost care not to offend or disgust the tribunal that sits in judgment by using undignified expressions or behaving in an improper manner. If he finds that the Court is not inclined to agree with him or to accept his reasoning, he should not lose his temper forthwith or become despondent, but make another attempt to convince the Court. In such cases, he should observe the greatest patience and self-control and try to convince the Court as to the truth of his propositions and the force of his argument by putting his reasons in as clear a manner as possible. It has been sometimes seen that a Judge who at first exhibits a distinct tendency to reject an argument, feels convinced when it is presented a second or a third time. But repetition in order to be effective must be made cleverly. A repeated argument should be dressed in quite another form of words. If this device is adopted, the argument would appear to be different although it may be in substance the same.

Begin gently and sincerely without any affectation or flippancy and state the material facts shortly in the plainest possible language, but long enough to state fully. Avoid needless repetition, and when you apprehend that the judge has not been sufficiently impressed, repeat the argument in a new form. Do not suppress any facts. State all the material facts for and against, taking care to explain the facts against you or to reconcile them with your own facts. Almost every fact has two aspects. The facts

of most cases and legal arguments are dull and uninteresting and endeavour your best to make them interesting by the manner of speech. The main thing is to hold the attention of the judge by arguing lucidly, intelligently and interestingly without tiring his patience. When the case is a difficult one and the odds are against you, never lose self-possession and look cheerful.

While arguing defendant's case it should be remembered that the right of reply is in the plaintiff and it is therefore necessary to forestall all possible objections that may be urged against him. Both sides having stated their cases and the whole evidence being before the parties, it is not very difficult to anticipate the points that go against the defendant. This is the time for taking stock of the whole situation and to display one's power of reasoning. Collateral facts might not be of much value when taken by themselves, but when fitted in with the material facts, they may render a thing highly probable. The weakness of the case should not be passed over without suitable explanation. The other side will have discovered them and when plaintiff's time comes, he will try to make the best use of them. The strong points should be placed in the forefront and forcibly impressed upon the Judge. "In addressing the Court, the advocate should remember that judges, having highly trained minds, usually understand what is said to them without difficulty, no matter how technical the language used, while in arguing a case to the jury he must use as few technical words as possible, and explain the few that he does use. In the argument to the Court he need not usually state his propositions more than once, while in his address to the jury he will often

be compelled to repeat them under different forms" (Hardwicke, p. 390).

A vehement assertion that a thing is true does not convince one of its truth. What is required is that the fact must be made to appear true by proper argument supported by reasoning and evidence. It is not enough to declare with force that an argument is conclusive. Its conclusiveness has to be established by proofs. Too much protestation arouses suspicion. Assertions are not arguments and do not carry conviction. Macaulay speaks of Hume thus: "Hume is an accomplished advocate. Without positively asserting much more than he can prove, he gives prominence to all the circumstances which support his case: he glides lightly over those which are unfavourable to it; his own witnesses are applauded and encouraged; the statements which seem to throw discredit on them are controverted; the contradictions into which they fall are explained away; a clear and connected abstract of their evidence is given; everything that is offered on the other side is scrutinised with the utmost severity; every suspicious circumstance is ground for comment and invective; what cannot be denied is passed by without notice; concessions are some times made, but their insidious candour only increases the vast mass of sophistry."

The authors of the "Work of the Advocate" say: "Harm is done by overstating the force of the speaker's own argument. The great advocates never overstate the strength of their own argument nor proclaim their confidence in them by exaggerated and emphatic assertions. They do construct their arguments strongly, and they do present them in a way that asserts their confidence in

them, but they do not do it by loud and vehement protestations, as feeble advocates usually do." (p. 377, 378).

To argue effectively, the advocate must have a thorough mastery of the facts disclosed in the evidence and the principles of law applicable to them. Wright, L. C. J., said: "First settle what the case is, before you argue" (Trial of Seven Bishops, 1688, 12 How. St. Tr. 342). Principal facts, names, dates, contents of documents, statements elicited in his favour during cross-examination should be memorised, or if this is not possible, they should be put down on a piece of paper for easy reference. The advocate should also make a note of the points on which he intends to argue. A *memoria technica* of this nature should be made use of, lest anything important is forgotten. When dates of events or documents are important, they should be given in their chronological order, so that the Judge may take notes and check them when writing judgment. There is much to be desired in this respect, as it is not unoften found that when a Judge asks for some information, the unprepared advocate becomes bewildered and gropes about for a reply. Facts are the foundation of an argument and preparation of facts is the foundation of good advocacy. An advocate who does not take pains to have a thorough grasp of the facts, before he goes to argue is bound to fail. It requires skill and experience in analysing the materials in the evidence and to extract the facts or circumstances that establish the advocate's case or destroy that of his opponent. The analysis must be searching. Irrelevant, improbable or trivial facts should be weeded out and the relevant, probable and material facts should be accepted. A power of discrimination is necessary in carrying out the

analysis and the theory of the case should be always before the mind's eye. An apparently insignificant fact or circumstance may form the connecting link in a chain of events that go to establish the case. It is not enough to state each fact independently. They must be presented in a connected form and their interdependence and probability or improbability must be discussed. Here again skilful array of facts, arrangement of argument and well balanced calculations are of utmost importance. There must be a carefully prepared plan for unfolding the argument step by step. It is better to have a memorandum containing an outline of the argument which the advocate desires to place before the Court in the order in which he intends to proceed, so that there might be no omission of the points sought to be urged.

The paper note should exhibit the points in the outer margin in different paragraphs and there should be another division showing the parts of the argument on each point, so that they may easily catch his attention and the advocate in his excitement during the address may not pass over to another point without dealing with the parts of argument on each point. The cases which he intends to rely upon in support of his propositions should be noted within a third margin. The strong points should of course be given the prominence. Memory is always treacherous and in intricate cases there is always the risk of some of the points escaping notice without such a *memoria technica* to help the memory. When the advocate has to reply to his opponent's case and to argue last, he should listen to his address carefully and note the points which require refutation. Close attention is imperatively necessary whether it be during the open-

ing, or examination of witnesses or address. It is said of Lord Russell that "one day a junior was taking a note in the orthodox fashion. Russell was taking no note, but he was thoroughly on the alert, glancing about the Court, sometimes at the Judge, sometimes at the jury, sometimes at the witness or the counsel on the other side. Suddenly he turned to the junior and said, 'What are you doing?' 'Taking a note', was the answer. 'What the devil do you mean by saying that you are taking a note? Why don't you watch the case?' he burst out. *He* had been watching the case. Something happened to make a change of front necessary, and he wheeled his colleagues around almost before they had time to grasp the new situation." (O'Brien's life of Russell, quoted in Wellman's Art of Cross-Exmn., p. 178).

The argument should be clear, convincing and concise, and though gift of speech is of great utility, it is not at all advisable to advance lengthy argument only to show one's power of oratory. The connection between advocacy and the art of public speaking has been indicated in a previous chapter (v. Ch. I). The argument should be confined to the facts and the law of the case without introduction of extraneous matters. Of what use is to make a long speech composed of words that carry no ideas or reasons and give vent to one's power of oratory unsuited to the occasion in the case. Upon the subjects of long speeches Mr. Brown an American advocate of fame says: "I am not, allow me to say, one of that class of advocates—though I speak in no disparagement of others—who seem to conceive the length and strength of a speech to be synonymous; I shall, therefore, if I have measured myself rightly, occupy comparatively but

a short time in discharging the duties that have fallen to my allotment. If my argument be to the purpose, it cannot be too short, and if it be not appropriate to the cause, and calculated to aid you in your deliberations, and secure your arrival at first results, it must certainly be too long." (Hardwicke, pp. 412, 413).

"The argument must be adapted to the case, and framed with the single purpose of securing the verdict of the jury in that particular case. Whatever will conduce to this end should be done, and whatever will not aid in attaining it should be sternly put aside. The one great purpose should determine the frame of the argument, no matter how strong the temptation to wander into collateral matters affording opportunity for the display of rhetorical and declamatory powers. We do not speak of eloquence, because we believe that there is no such thing as genuine eloquence where the speaker's words do not tend to convince or persuade in the particular case in which he speaks ; for, no matter how beautiful his imagery or well rounded his periods, his eloquence is spurious, resembling the genuine only as the counterfeiter's most skilful work resembles the treasury note that bears the government's warrant of value. To be eloquent, the diction and structure of the speech must be suited to the occasion" (Work of the Advocate, p. 350, from Cicero).

"There is a power in words. Words withous ideas are so far as conviction and pursuasion are concerned, barren things. They are husks without kernels. But, paradoxical as it may seem, common place ideas, and, indeed, even feeble ones, derive power from strong words. When both the thought and the language are strong there is real power ; but a really strong idea may sometimes be

so incased in words as to be, so far as a hearer can perceive, deprived of its strength. On the other hand, feeble ideas may sometimes be so girt with words as to seem strong. Strength in oratory does, in no small measure, reside in words. Many an idea is shorn of its strength by a divesture of its vigorous words as effectually as Samson was of his strength by the shearing of his hair."

"The words of power are special words, and the special words of greatest power are, generally, the short, simple and plain ones. A man thoroughly in earnest seldom uses grand words. Short words with a special meaning name things and give them as nearly a real character as it is possible for words to do. Names with a meaning are instruments of power. Power in diction as well as in thought, is what an advocate most needs." (Work of the Advocate pp. 362, 363, 364).

The style should be suited to the occasion and an attempt to imitate others by abandoning his own style will only make himself ridiculous. A meretricious style and a display of high sounding words and phrases adorned with tropes are ill suited in a Court of law. A fondness for *cliche* or commonplace arguments produces boredom. Sophistry and trickery excite disgust and never succeed in a Court of Justice. It is logic and not magic that is of the greatest use. There are no doubt occasions which require the invocation of oratorical powers. But mere sound and fury are no substitutes for argument and reason. An argument dressed in beautiful and pursuasive language has a charm all its own. There is no eloquence when the words do not carry conviction or when the argument is not supported by the evidence in the case. Above all

affectation should be avoided. It is not possible to convince another, when the advocate does not believe in what he argues. Earnestness and determination are sources of power and are bound to find echo in the hearts of those whom he addresses. Some men have a *flair* for using beautiful and appropriate words and putting things nicely. Preciosity in language is a gift, few men possess. It is they who achieve the greatest success. Appeal to emotion has its use, but the effect cannot be permanent unless there are solid facts to establish the theory of the case.

"It must be borne in mind by the advocate that digression which would be perhaps pardonable in a speech to a popular assembly or in address to the jury, would be entirely out of place in an address to the Court, and he must not think that the ancient judicial orations as models, because strict law was much less an object of attention at Greece and Rome than it is with us." "For these, and other reasons, according to an able writer, 'it is clear, that the eloquence of the bar is of a much more limited, more sober and chastened kind, than that of popular assemblies, and for similar reasons, we must be beware of considering even the judicial orations of Cicero and Demosthenes, as exact models of the manner of speaking which is adapted to the present state of the bar.' It must not be inferred from what we have said, however, that eloquence at the bar is not useful, and that in speaking to the Court oratorical excellences are out of place. Eloquence which is sober and chastened is needed nowhere more than at the bar. Many of the causes discussed are devoid of interest, and the eloquent speaker can always command attention, and it is not usual for anything he says to pass unregarded. There is always

a great difference in the impression made upon the audience, who sometimes listen to the argument of questions of law by a dry and confused speaker, and that made by one who pleads the same cause with elegance, ardor and strength. The spectators remark, and the parties to the cause watch, and the advocate who succeeds always in putting his cases well to the Court will, in the end, have the greatest multitude of clients." (Hardwicke pp. 392, 393, 394).

"The advocate while addressing the Court should by all means avoid a dogmatic manner. Even if he has the greatest ability and an inexhaustible fund of legal knowledge, he should carry himself with modesty and deference. Rufus Choate's bearing in Court was always modest. One of his biographers says of him :—"His demeanor and bearing in the court-room was very interesting. It was a model of gentlemanly deference. He took his seat in the most modest, unassuming way. Indeed he never did anything which had the appearance, to use the vulgar phrase, of 'making a spread'. If, as sometimes happened, the opposite counsel was a young man, the manner of the youth would generally indicate that he was the greater man of the two. Even when the evidence was in, and Mr. Choate came into the Court, on the morning of the argument, pressing his way through the thronged bar and the crowded aisles, he came with no bold warranty of supremacy and success in his manner. Notwithstanding his quiet and gentlemanly demeanour, whenever the exigencies of the case demanded courageous conduct, no advocate was ever more courageous, and the same biographer says of him : "Whoever or whatever stood in the way of his success, whether high or low, rich or poor,

must go down. It would go down with no unnecessary flourish of trumpets, no bullying, no violence, no insult,—but it must go down" (Hardwicke, pp. 397, 398).

"The manner of William Pinckney in Court was arrogant and offensive and made him many enemies. He was dictatorial and often insulting in his manner. Daniel Webster was insulted by Pinckney on one occasion in the Supreme Court room during the argument of a case. Webster had too much respect for the Court to reply to his insulting language but when the Court adjourned he took Mr. Pinckney into a room in the Capitol, telling him he wished to speak to him on a matter of business. When they entered the room Webster locked the door, unperceived by Pinckney, and put the key into his pocket. He then stepped in front of Pinckney, and said to him in substance, "You insulted me in the Supreme Court to-day, and you must apologise to me now, and to the Court in the morning, if you do not do so one of us will leave the room in a worse condition than he was when he entered it." Pinckney turned as pale as death, and looked steadily at Webster for a moment, then he said: "Webster, I did try to impose upon and to bully you, and I am willing to make the apologies you request me to make. Mr. Webster then unlocked the door, and they both left the room." (Hardwicke, pp. 398, 399).

As to the demeanour of the advocate during address and the manner in which argument is to be made. Warren's suggestions will be of inestimable value to all practitioners. They are quoted extensively and young lawyers will do well to read them very carefully:

"Be uniformly respectful, but never servile, to the Court. Be firm, if you please—but approach not the

confines of flippancy, familiarity or presumption. A rebuke under such circumstances will be justly galling and humiliating. The ear of the Court is gained by modesty, and by speaking briefly and to the point. It is closed against assurance, volubility, prolixity, repetition. How disgusting and intolerable is it to hear a man going doggedly over ground already gone over—as if the judges had not heard or understood your senior—as if there were no other case to be heard but your own—as if you were not the subject of the 'curses, not loud but deep', of those whom you keep waiting to be heard in their own cases—possibly of far greater importance than that with which you are pestering the Court *ad nauseam*! Observe how differently the Court listens to a sinner of this sort, and to a man who has earned the character of being brief and lucid. Do not give up too easily; but avoid that accursed pertinacity which you may occasionally see exhibited. Look at the faces of the judges while suffering under the infliction. Be courteous to your opponents. When you find that you are being beaten, then is the moment to guard against the least manifestation of a ruffled temper—of irritability, or snappishness, or downright ill-humour. It will provoke only laughter or dislike. 'Tis at this pinching point that you may infallibly distinguish between the temper and breeding of different men—between the man well-bred, and him underbred, or ill-bred. A gentleman is a gentleman to the end of the chapter. Never take offence at what is said or done by your opponent, or your leader, unless you deliberately believe that offence was intended. If that be the case, you must act as your own sense of self-respect may prompt—with spirit but prudence. Never permit

yourself to speak in a disparaging tone of any of your brethren in the presence of clients. If you cannot praise, be silent. Do not expose a slip, or error ; but, if possible, and consistent with your duty to your own client, conceal that slip or error, as you would wish your own to be concealed.

"Avoid buffoonery in conducting a cause. Use no vulgar language, jokes, gestures or grimace. Play to the critics in the pit, not to the gods in the gallery. You may possibly make a foolish juryman and bystander laugh with you, when every one else is laughing at you, or is indignant at the degrading exhibition which you are making, possibly before some foreigner, or stranger of critical acuteness and refinement, and who may speak of what he has seen, as a sample of the English bar.

"Pay attention to manner. Take a few lessons in elocution, if conscious of deficiency. Stand straight up while addressing either judge or jury, or examining a witness, and do not be sprawling over the desk and benches. Speak with distinctness, emphasis and due deliberation, if you wish to be heard and attended to. Do everything in your power to acquire self-possession, practice at debating societies, or elsewhere as you may have opportunity. A flustered speaker is always a bad one—giving pain to his auditors, and securing to himself harassing consciousness, on sitting down, that he has not done justice to either his clients or himself. When you are unexpectedly let alone in a case, keep quiet—be tranquil. Do not proclaim your inexperience or incompetence, by fidgetting yourself and others. To adopt a Scottish phrase, 'Dinna fash yourself.' When a hint is given you

by an experienced neighbour, give your mind to it, and receive it with courteous gratitude.

"*Never under value your opponent,* but give him credit for being able to take advantage of the weak parts in your own case, and be on your guard accordingly.

"Do not be disheartened when facts come out adverse to your case, either unexpectedly from your own witnesses, or from those of your opponent. Every fact has two aspects, one favourable to him who adduces it, and another favourable to you, if you have sharpness enough to see it. The moment that it is established in evidence, try to reconcile it with your own facts. Endeavour to secure a command over your features. When the most desperate mischance is befalling you—when the iron is entering your soul—look calm and maintain an air of cheerful confidence. In this the late Lord Abinger and Sir William Follett were perfectly successful. The jury are watching you, and are often much influenced by such matters. Never attempt to deceive the judge. When he asks you a critical question, answer cautiously, but not disingenously. Scorn equivocation, equally the *suppressio veri* and *suggestio falsi.* Candor and frankness are precious qualities in judicial estimation. Consider how silly and useless is the attempt to play off the petty tricks of practice with men of their thorough experience and knowledge of the profession—its members—and its ways. You may perhaps have too much assurance or stolidity to perceive it, but every one else may see significant and dangerous indications of their profound contempt towards you."

Some men prefer to deal with the opponent's case first and it is not a bad way of proceeding. It is better to

demolish the adversary's case before producing your own forces. The arguments should be founded upon proved or admitted facts and upon evidence on the record. An advocate should in no case travel beyond the record and try to persuade the Court by outside facts or circumstances. He may make inferences or propound theories, but they must be based on the facts and should not be fanciful. He should always be candid and fair and should not try to conceal from the Court any fact which it is necessary to know in order to come to a right decision. He may put his own interpretation, but he must never misrepresent the facts or try to mislead the Court. He must not deviate a jot from truth and hazard a statement not borne out by the record or which he cannot prove. Never try to deceive the judge or prevaricate. A lawyer may, if he thinks it would advance the interest of his client, make a suggestion to explain the evidence, although it is not supported by the evidence on the record. (4 I.C. 176). While it is open to an advocate to advance any theory or make any suggestion that may spring from the facts and surrounding circumstances or motives, he cannot at any stage of the trial give out his own personal opinion of the case one way or the other (*v.* ante p. 69). Lord Kenyon said: "Counsel are frequently induced, and they are justified in taking the most favourable view of their clients' case ; and it is not fair to pass over any piece of evidence they find difficult to deal with, provided they cite, fairly and correctly, those parts of the evidence they comment upon" (*Case of Earl of Thanet*, 1799, 27 How. St. Tr. 940). If illogical or absurd arguments are put forward or assertions not borne out by the evidence are made, they are bound to be checked and exposed at every step

by the Judge or the opponent. Besides annoyance and loss of time, this would create a very unfavourable impression on the tribunal, which would not only minimise the chance of success in the particular case argued, but produce a far reaching effect by discrediting the methods of the advocate. He will lose the confidence of the Judge without which success or reputation can seldom be achieved. Gibbs, C.J., said: "There is usually a decency about counsel which prevents them from pressing that to a conclusion which can never be concluded (*Tomkins* v. *Willshear*, 1813, 5 Taunton, 431). Inconsistent arguments disgust the tribunal and is tantamount to a confession that the advocate has nothing better to say. Bullen, J., said: "It seems to me that the argument of the defendent's counsel blows hot and cold at the same time" (*J 'Anson* v. *Stuart*, 1787, 1 T. R. 753). In *Crosser* v. *Miles*, 1774, Lofft. 595, Lord Mansfield said: "Don't you foist in a proposition which is not allowed." When counsel made a preposterous argument before Grantham, J, he replied that "a grosser perversion of English justice it is impossible to imagine, and I should indeed be sorry if, under any circumstances, it could be proved to be English law" (*Burrows* v. *Rhodes*, 1899, L.R. 1 Q.B.D. 823).

"A writer in the *American Law Review* (Vol. 40, p. 280) goes to the extent of saying that an advocate should not put forward arguments which he himself considers unsound. This is not only unpracticable but also fundamentally wrong. It is not the function of an advocate, and he ought not to usurp that function, to decide what is sound or correct. That is the duty of the judge, and no advocate has the right to refuse to put forward an argument or an aspect of a case, because he

regards it as unsound. After all what does an advocate know of a case except what he has been told by his client. What his client has told him may show that his case is not good, but what comes from the opposite side may show that his case is much better than he thought it was, and it will be confusing the functions of advocate and of judge for an advocate to take upon himself the task of deciding what is the correct view in any particular case. Indeed the public would suffer seriously, if that were the view adopted by the profession. In the first place, such an attitude of mind would disable an advocate from seeing his client's aspect of the case as clearly as he would, if he understood his task properly, and, in the next place, it may be that an aspect which is really one that ought to be put forward would be kept back, because the advocate himself did not set a right value upon it" (Aiyar's Professional Ethics, pp. 76, 77). This opinion of Aiyar is no doubt correct so far as it goes, for it is not the function of an advocate to decide what is right or wrong, but to put his client's case before the Court with the best argument that he can think of. But is seems that the rule applies when the point is such that more than one view is possible, although the advocate may be diffident of the soundness or correctness of the view that suggests to him. He will no doubt present it with his reasons to the judge, for it is no knowing which view will commend itself to the judge. But if a proposition is well settled by authority, the rule ought not to apply, for a preposterous argument running contrary to it will only make advocate ridiculous in the eyes of his brethren in the profession and lower him in the estimation of the judge.

Where issues have been framed, it is better to take

them up one by one, but not always in the same order in which they are put down on paper. Issues which are correlated to each other should be taken up together. The important points should be argued first and then the minor points, should they be necessary, so that the patience of the Court may not be exhausted by the time the end of the argument is reached. It is always a good policy not to dilate upon untenable or flimsy points. Remember that one good or substantial point is better than a dozen doubtful ones. Sometimes it is enough if the less important points are simply mentioned without elaboration. That would be more effective, as it would show that you have many points besides the stronger ones with which you do not want to take up time. Those points which appear to go against you should at the same time be explained so that their real import may be readily perceived. But before you proceed to argue, you should weigh and determine which is your strong point and which is your opponent's weakest. The advice which the Lord Chancellor gave when speaking at the annual dinner of the Hardwicke Society, 1925, is well worth quoting:—"Avoid two great perils from which he and others suffered, namely the habit which some experienced people had of taking every point, even the bad ones, and of quoting every case, even those which were irrelevant. He knew nothing which was more desirable in the advocate than that he should throw away all the points which were really not quite good sound points, and take those which were good and stick to them. He would earn the gratitude of the Bench and the attention of those who heard him, and often obtain by that method a decision in his favour."

The advice of Sundara Aiyar, who was a distinguished

judge of the Madras High Court, as to the advocate's duty in the submission of facts, is entitled to considerable weight. He says: "In addressing arguments to a Court—what is the duty of the advocate? There, I think, the difficulty is much less than in leading evidence. There can be no doubt that nothing which is on record should be suppressed, and everything material should be honestly put before the Court, but here again a good deal must be left still to each individual's conscience. It can hardly be pretended that everything that has been introduced into the record, including sometimes a great deal of irrelevant matter and much of a trivial nature should be put before the Court ; but it would be not merely right, but also good policy, to put before the Court every thing that could be material from the point of view of the opponent. The opponent is likely to make capital out of any omission and suggest that the omission was intentional, because in the opinion of the advocate himself it would have a damaging effect on the case of his client. What then is the scope of the advocate's art in the submission of the facts? His first duty is to completely master the facts and the law, and present them in as attractive a garb as possible. He should use all possible efforts to arrest the attention of the Court and to state the facts in an interesting way and avoid all dull and prosy talk. If he does that, you may be certain he is not likely to get the judge's attention, who will prefer to look into the papers himself. It is not wise to read much out of documents ; it would be very desirable that the reading should be confined to the most material portions ; it will be much better that with regard to the remainder you should state

in your own language ; otherwise you will not be able to hold the attention of the Court.

"Perhaps you may imagine, if an advocate is bound to put everything before the Court—all the facts—then, how is he at all to succeed in producing an impression in favour of his client? You may ask: "If *both* sides are to put all the facts, why require two counsel?" But in reality, thus is a great deal of scope for the advocate's art, notwithstanding his duty to state all material facts. Let me give one illustration. Suppose you have a picture. The appearance it presents will differ according to the places form which you look at it and according to the light in which you see it. I may say the advocate's skill, if he has any, will consist in putting the judge at a particular place, in distributing the light and shade in the manner that will suit best his client. It may look monstrous, viewed from one angle ; it may look handsome and even beautiful looked at from another. When both sides have exercised their skill in the presentation of the picture, it will be the judge's duty to see the picture from all points, to shift his own position, to go round and to see and examine every part. It would not be illegitimate on the part of an advocate to adjust the proportion of particular facts to the exigencies of his client's case by placing some facts first, and others last. A good advocate can impress the judge sometimes in a way that he cannot get beyond him ; he can be induced to place everything coming from the opposite side in the setting already imposed on him, and the result is that facts which might really be important appear to him to be comparatively trivial, when they are afterwards stated by the opposite side. If you see two skilful advocates arrayed as

opponents, you would then be able to witness a picture presented by one advocate ; then, when the turn of his opponent comes, the whole thing being reversed, the same facts being stated by him—in a different order, placed in a different setting. Every good judge will feel it his duty not to refuse to examine any case from the advocate's point of view ; and no judge need be afraid to do so, because, after he has acceded to the request and looked at it from a particular point of view, he, of course, looks from other points of view, and nothing is more conducive to a thorough grasp as to look at the same thing from different points of view."

"An advocate is doomed to failure who can only repeat the same thing in the same language : that is indeed the best way to obtain the reputation of a bore. At the same time there is one mistake committed by beginners,—sometimes also by people who are not beginners—namely, that they do not dwell sufficiently on an important fact, or on an important aspect of the case. That aspect being familiar to the speaker, he thinks that it has only to be mentioned in order to obtain recognition ; but the fact often is that the judge's mind is possessed by some particular aspect of the case. It is, therefore, important that, when it is necessary, the advocate should dwell on a particular matter, but the right way to dwell on is not to repeat in the same form, as I have already observed." (Professional Ethics, pp. 65-69).

"It is generally the best policy not to disregard the opponent's facts, on record, and it is one of the best efforts of advocacy to get the judge to minimise their weight and importance. So far as an original trial is concerned it may safely be affirmed that one is not bound to bring

into the record all the facts that have a bearing on the case. But there are some duties which are often neglected but which ought to be honestly and thoroughly performed. If a client is called upon to produce documents in his possession, they ought to be produced, and every advocate ought to advise his client that, whatever may be the result, he has no right to suppress documents in his possession if called for by the other side. I am afraid that there is sometimes much laxity in the observance of this rule. Some pleaders are apt to say to themselves: "Why should I help by producing my document? Let him give secondary evidence"—that is absolutely wrong. You know of course that every person is bound to produce all documents in his possession except that strangers to the litigation are not bound to produce their title-deeds." (Professional Ethics, pp. 63, 64).

The minor discrepancies or the trivialities of the case should be always ignored. Too much attention to them would create the impression that you have nothing better to fall back upon. When examining witnesses some men have a habit of framing questions with the sole object of getting discrepant statements on minor or irrelevant facts and during their argument they make it a point to harp on these discrepancies. Discrepancies or inconsistencies on collateral facts or facts not in issue are of very little consequence. Discrepancies on material facts are no doubt of importance when weighing evidence. But it must be remembered that there are discrepancies of truth as well as discrepancies of falsehood. Men's powers of observation and expression vary and an account of an event by two equally truthful persons may be discrepant and yet substantially accurate. Discrepancies in the

statements of witnesses on material points should not be lightly passed over as they seriously affect the value of their testimony. References to time, specially by illiterate persons, are largely approximations and there is a large margin for honest error. An argument founded upon the maxim *falsus in uno falsus in omnibus* will not always carry the same weight. The maxim is not strictly accurate and cannot be followed implicitly by courts of law. A portion of the testimony of a witness may be wilfully false and yet the rest may be unassailable. A man may be impelled by a particular motive to speak falsely to one thing but it may not affect the other part of his testimony. "For weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities and common sense and shrewdness must be brought to bear on the facts elicited in every case which a judge of fact in this country discharging the functions of a jury in England, has to weigh and decide" (*Lord Advocate* v. *Lord Blantyre,* 4 App. Cas. 792 ; *Q.* v. *Madhub,* 21 W.R. Cr. 13 p. 19). It is often unwise to overproclaim the truthfulness or respectibility of a witness. If his testimony agrees with facts or makes the circumstances probable, it is a matter of demonstration by weighing the facts. Similarly the opponent's witnesses should not be declaimed as "liars" in every breath. Their untruthfulness should be shown by the absurdity of their testimony. The corruption of a witness should be proved by facts and not by abuse. An unjust attack on a witness will have the opposite effect.

The most important things are *lucidity, arrangement, method and order.* To state facts pithily, methodically and accurately is a habit of mind which requires cultiva-

tion in those who do not possess it. An advocate who presents a case in an uninteresting manner by a dry statement of facts without method or order, may some times win on account of fortune or the innate strength of his case or because his opponent is equally incompetent ; but he will never succeed in the long run. No useful purpose is served by overstating an argument or by making a dogmatic assertion. Assertion is not proof. Too much protestation creates suspicion. The facts must be made to appear true or probable by proofs. The evidence must be subjected to a thorough analysis. Material and probable facts should be separated from the immaterial and improbable facts and the conduct and credibility of witnesses must be fully discussed. The probability or improbability should be considered in the light of facts disclosed at the trial and surrounding circumstances and not on fanciful ideas. Arguments must both be advanced and met. Interruptions during address are a source of annoyance. Each party will have his turn and remarks or comments should not be flung while the other side is arguing his case. Interference can only be justified when there is a deliberate attempt to mislead the Judge by misstatement or distortion of facts, or where reference is made to facts outside the record. This matter has already been dealt with before (*ante* Ch. V).

Repetitions may be sometimes necessary to drive an argument home, but constant repetition is the product of poverty of thought. If a matter is repeated *ad nauseam* it tires the Judge and shows that you have nothing more to say. Sir John Simon humourously observed : "I have heard advocates say that it is always necessary to repeat an argument at least three times, especially when you are

addressing a tribunal which consists of more than one judge. You have to repeat it for the first time in order that the judge may understand it; you have to repeat it for the second time in order that he may explain it to his brother; and you have to repeat it for the third time in order to correct the erroneous impression which he has unfortunately conveyed." If repetition is necessary, specially when it is apprehended that the argument has not been appreciated, it should, if possible, be repeated in a different form so as to give it the appearance of a different argument. A thought clothed in different words has the appearance of a new thought.

In *Munster* v. *Lamb*, 1833, L.R. Q.B. 603, Brett. M.R. said: "A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. What he has to do, is to argue as best he can, without degrading himself in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrased that he could not do the duty which he is called upon to perform. For, more than a Judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law is privileged and the reason of that rule covers a counsel even more than a Judge or a witness."

CHAPTER IX.

LEGAL STUDY AND ARGUMENT—LAW OF THE CASE.

The law of the case requires as careful attention as the facts, and sometimes more. Lawyers in the mofussil are often heard to say that legal points are so few in cases in their courts, that it is not worth while to bother much about them and that it is the special business of lawyers practising in the High Courts to canvass legal points when appeals are taken on points of law. This is a mistaken view. The major portion of the work in the High Courts consists of appellate work which go from the Courts scattered over the Provinces. If there are no legal points to argue in these cases, how is it then that nice points of law crop up when they are argued before the High Courts. Very many cases bristle with points of law and it is only a desire to avoid a diligent study of the vast literature on law that is responsible for the statement. Many cases can be knocked on the head by raising insuperable points of law. A question of estoppel or *resjudicata* properly raised in the Court of first instance or a question of admissibility of oral evidence of any agreement in contravention of s. 92 of Evidence Act may sound the death knell of many cases and avoid agitation on the points in appellate Courts. "We trust we have made it plain that no advocate at this day can reasonably expect to be successful at the bar by becoming eloquent and neglecting the study of law. Lord Erskine, in a letter which has been published says, "That

no man can be a great advocate who is no lawyer. The thing is impossible." This is literally true, and the sooner the advocate realises this fact the better." (Hardwicke, p. 402).

"The proper study of a lawyer is law. An advocate can never hope to become successful in the argument of questions of law unless he is a good lawyer. How some men get on at the bar is a mystery. They rarely read law, and they often make themselves ridiculous in Court by attempting to talk about something which they do not know anything about. As long ago as 1828 Mr. Park computed the number of points in a moderate law library at about two millions and a half. This computation was made sixty-six years ago, and, owing to the changes in the law continually taking place, will continue to multiply. Diligence thus in the acquirement of legal principles, is indispensably necessary to every lawyer who would be heard with attention by the Court." (Hardwicke, p. 404). I have on more occasions than one seen suits brought upon pronotes unstamped or insufficiently stamped and on pointing out the inadmissibility of such documents and the non-maintainability of such suits, was met with the argument that the defect could be remedied, like any other insufficiently stamped document, by impounding and levying penalty. Some advocates even argued that pronotes of the value of twenty rupees or under did not require any stamp like a receipt for money paid. All these can be avoided if a person entering the legal profession makes it his first business to equip himself with a fair knowledge of law and legal principles. Mental endowments and strong moral sense are no doubt necessary to make a successful advocate, but it is no less

important that he should have a thorough knowledge of law. This can be acquired only by an intense and diligent study of the subject during the first few years of his professional life. And when once this habit of studying law books and law reports has been acquired and the subject found interesting, that true advocate will continue this study amidst his various preoccupations in later life. The first five or six years of an advocate's professional career will generally determine his standing at the bar. It is at this period that he has plenty of time and enough energy, and if this valuable time is wasted in yielding to the temptation of pursuing society pleasures and other amusements without devoting himself to a diligent study of the law, he will never be able to achieve that eminence in the profession which must be the ambition of every young lawyer. He must from the beginning keep himself aloof from pursuits like these and try to build up a modest library of law books. It is true that many in this country take law degrees in the midst of a severe struggle with poverty and have not the resources to buy the necessary books. But with a strong will and a determination to have a modest library of his own, an advocate can certainly have a decent collection of books, if a very small amount is laid by every month for the purpose. If necessary, this can be easily done by economising certain items of expenditure on food, drink, dress &c., or denying certain luxuries like cinema, &c. The total amount spent by every one of us on avoidable luxuries or things of acquired taste is not negligible. While starting practice, it is indispensably necessary to subscribe to a law journal, but this is done by many rather late in life on the plea of want of fund. Expenditure of a rupee or two every month

on this item should be considered as necessary as the money which must be spent for preserving life whether one has it or not. Considerable help can be obtained in the beginning of one's career by borrowing books from the bar library, but this opportunity is not availed of so widely as may be desired.

I think it has been made sufficiently plain that a good knowledge of law is an indispensable equipment for a good advocate. An advocate with a superficial or poor knowledge of law is a contradictory term. When a man calls himself an advocate, it implies that he is learned in law. It is assumed that he has a knowledge of the principles of law and of the rules of pleading, procedure and evidence. If there is any legal point in the client's favour, it must be taken full advantage of, even if it be a technical one. Technicalities are sometimes the life of the law. For instance the objection to the admission of a copy of a document without calling for the original is a very substantial point. It is technical in a sense, but the law requires that the document should not be admitted in evidence when the original is not called and the omission can never be excused however harshly the rule might operate.

In order to appreciate legal arguments, the judge must also be well versed in law and procedure. Legal study is no less important for a judge. Unfortunately the present system is to a great extent responsible for the want of legal knowledge in I. C. S. judges and the charge has often been laid that advocates are greatly handicapped when arguing legal points before these judges. Advocates should therefore take particular pains in elucidating legal points when arguing their cases before them. Judicial

work requires highly specialised training. The value of judicial training, experience and legal study cannot be too highly spoken of. It will be found that most of the eminent witnesses examined before the Public Services Commissions were of opinion that members of the Indian Civil Service meant for judicial work should act for a few years as munsifs and sub-judges before they are made District Judges. The Government had made such a scheme and sometime ago I. C. S. officers were employed for a time as munsifs and sub-judges. Now a days, I. C. S. officers of five or six years' experience as joint magistrates and deputy collectors and sub-divisional officers with very little experience of actual criminal work and none at all of civil work are suddenly made District and Sessions Judges. In an address delivered by Sir Robert F. Rampini, I.C.S. (late a Judge of the Calcutta High Court) at the East Indian Association London, on May 24, 1909, he said: "The results are often deplorable. The newly appointed District Judges cannot fail to be at first far less competent than the native judiciary whose work they have to supervise and whose decisions are appealable to them. They necessarily commit blunders, and though they may be corrected in second appeal, the present system involves a waste of time and power not to mention the unnecessary expense in which it involves litigants." The majority of the witnesses before the Public Services Commission were of the same opinion. Mr. Sidney Low in his "Vision of India" has said: "It is common talk that many of these gentlemen (civilian judges) are the failures or comparative failures of the service. Even when they have been chosen because they exhibit a natural aptitude, their professional qualifications

must often be very weak. They can hardly ever have found time to acquire a legal training, and have usually picked up the law in the course of their magisterial duties. . . . . One of the leading barristers of India told me that he sometimes found considerable difficulty in arguing before the district and divisional courts because of the ignorance exhibited on the bench. He went so far as to declare that he even preferred, if the case were at all complicated, to lay it before native judges. 'They at least' he said, 'are lawyers and can understand a legal argument.' " Mr. Howard, D.P.I., Bombay wrote to the Government more than fifty years ago: "I am well aware that many members of the Civil Service believe that a judge in this country need have no law ; that 'common sense' is enough for him ; illuminated by practice and knowledge of the people. To this it would certainly be replied, with unanswerable force, that the question is not between knowledge of law on the one hand and practical experience on the other, but between law and no law, practical experience being equal on both sides" (quoted in a speech by Dr. Rash Behary Ghose).

The law which an advocate requires in a particular case, is the law which is applicable to the case before him. He may have a very good knowledge of law, but it will not be of much avail, if he does not know the law of the particular case. A knowledge of legal principles must be accompanied with a capacity to apply them. In order that he may apply the law, he must think over the case and first build a hypothesis of his own. It is not possible to find out the thing he is in search of, unless he has an idea of the thing. Warren in his "Law Studies" says: "It requires the nicest discrimination to ascertain

whether a particular case falls within the general rule, or is governed by some of its endless limitations and exceptions, and this discrimination must be the result of calm, leisurely and extensive study and practical experience. General principles are edge tools in the hands of the legal tyro, and he must take care how he handles them."

Law is essentially a practical science. Reports and text-books contain numerous decisions and statements of legal principles. But what is required of the advocate is a capacity to apply the correct principles to particular cases. The method adopted by Rufus Choate, one of the greatest advocates of America is an admirable one and this is what he says: "My first business is obviously to apprehend the exact point of each case which I study—to apprehend and to enunciate it precisely—neither too largely—nor too narrowly—accurately, justly. This necessarily and perpetually exercises and trains the mind, and prevents inertness, dulness of edge. This done, I arrange the new truth, or old truth, or whatever it be, in a system of legal arrangement, for which purpose I abide by Blackstone, to which I turn daily, and which I seek more and more indelibly to impress on my memory. Then I advance to the question of the law of the new decision—its conformity with standards of legal truth, with the statute it interprets, the cases on which it reposes, the principles by which it was defended by the Court—the law—the question of whether the case is law or not. This leads to a history of the point, a review of the adjudications, a comparison of the judgment and argument with the criteria of legal truth. (Brown's Life of Choate, p. 120).

Warren in his "Law Studies" has given valuable

suggestions on the point: "Some minds have wonderful aptitude for mastering the most intricate combination of facts; seeing at a glance their true bearings and remembering them with accuracy for almost any length of time. This is a rare and valuable quality in a lawyer, one enabling him to discharge the most arduous professional duties with ease and rapidity.

"Attention and judicious exercise, however, will give a high degree of this power, to even those who have long, and with reason, despaired of acquiring it; who have had long to lament the want of a clear and comprehensive intellect. He who is in this situation, and would better himself, must not only begin well, but 'preserve in well doing': and that he may do this effectually, he is requested to attend to the following brief suggestions:—

"Let him address himself to any statement of facts or arguments, either in the books or in actual business, with calmness and deliberation; not permitting his mind to wander, or hurry over details even apparently the most insignificant. It requires much skill and experience to know what facts are, and what are not, really insignificant: and the student must wait for some years before he undertakes such a decision, at first sight. Let him read attentively through the statement, from beginning to end; and in doing so, make any little notes or marks he pleases, in order to assist his recollection of what appears to be of leading importance. Then let him cast off his eye from book or papers, and strive to go over the whole in his mind; a habit which will be attended with several advantages. It may teach him forcibly, the frailty of his own powers—his indistinctness of apprehension, his feebleness of memory. Before he undertook his ordeal,

he probably fancied himself in perfect possession of what he had read: that he retained a distinct and orderly recollection of the whole, when, alas, mortifying fact! he finds himself, on being put to the trial, utterly at fault; scarce a trace clear—but all indistinctness, confusion and error. Is not this, then, calculated to startle him into strenuous efforts to remedy so serious and fundamental a deficiency? A second perusal will probably clear up many; a third may dissipate all obscurities. He will then have his case fully in his mind, so that he could undertake to state it even in open Court, before judge or jury, and having thus mastered the facts, will not find much difficulty in applying to them the law. Let the student persevere in this course for a little time, and he will soon find how much it has quickened and invigorated his powers. It will inure him to habits of patient investigation, accurate discrimination, tenacious retention and decisive judgment."

The facts out of which a question of law arises must first be thoroughly understood. It is idle to think of finding out the appropriate law unless one has a clear idea of such facts. Before turning to case-law, one should seek light from the broad legal principles which every lawyer must have equipped himself with. If the rule of law applicable to the case is to be found in the section of a statute, the section should be carefully studied. It is not enough to say that an advocate knows the section—he must read and re-read it till he has arrived at the various interpretations that it is capable of. He will then be able to realise how to meet his opponent's interpretation of it. It is not always easy to find out the exact meaning of a section. Daniel O'Connell said that: "he

could drive a coach and six through almost every Act of Parliament". In many cases, a careful study of the section, word by word, will enable the advocate to find out what he has searched for in vain in many bulky Reports.

If the section has not dispelled his doubts, he should then look for authorities. These are to be found in text-books, Digests, Law Reports etc. In the opinion of some, the innumerable number of reported cases has made the task of finding out precedents lighter. But it should also be remembered that the accumulation of a vast number of reported cases, demands greater industry in study in order that they may be made proper use of, and heightens the possibility of conflict of decisions. In India with so many High Courts and Chief Courts independent of each other, the number of inconsistent decisions is growing apace and is a source of considerable perplexity. Indiscriminate reporting of cases is also responsible for uncertainty in law. A decision may have been justified by the peculiar facts of the case and it may not have enunciated any new principle of law. It would have been possibly best to consign it to oblivion, but its publication in the Reports opens the door to speculation as to its use in an apparently similar but really different set of circumstances and mistake or confusion is not at all unlikely. In his 'Foreword' to the writer's "Law of Evidence in India," Mr. Justice Walsh says: "The judicial task is complete when the Judge, or Bench, has applied to the language of a section, the natural meaning of the words. It is astonishing that it should be thought necessary to deliver a thoughtful judgment, and even to cite authorities, explaining that section

means what it says. It is more surprising that one should think it worth while to report the case. I fear the responsibility rests rather with the reporters and with the editors of reports, particularly unofficial reports. I have been amused at times to renew acquaintance with my own platitudes, solemnly recorded with all the majesty and importance of "an authority", after I had supposed that I had said farewell to them for ever in the necessary but obvious reasons for a decision."

If you are in search of fundamental principles, it is better first to consult books of authority—books which are not merely digests or collection of cases, but are the product of much learning and original thinking. "The treatises of the sages of the profession whose works have an established reputation for correctness may be referred to as guides." But errors have been detected in text-books by Courts and on the other hand, text-writers have sometimes corrected the errors of Courts (see Ram on Legal Judgment, Ch. XII).

In legal study, a very important subject is distinctness of thought and recollection. As to the power to think distinctly and remember accurately, Warren says:

"This is a quality essential, of course, to the successful study of any science; but there are reasons why the want of it is peculiarly felt by legal students, and why its attainment is a matter of great difficulty. It is certainly a much rarer quality than is generally imagined—and he is often signally destitute of it, who is least conscious of the fact. The very nature of legal science contributes to this —for its general principles, though their deep foundations are reason and justice, and fettered and restricted by such subtle distinctions—they admit of such endless exceptions

and modifications, as often to prevent anything like a clear and distinct knowledge of their proper character and functions, at least in the case of beginners. The science of the law thus apparently expands into a vast series of details—details barely distinguishable from one another by the most practiced powers of discrimination. The facts again,—often imperfectly stated,—are always varying frequently only by shades of difference scarcely perceptible ; and are sometimes so perplexed and intricate that unless extraordinary effort be made, the mind loses sight of the governing facts—the leading details—and floats away amid a haze of minor circumstances. The requisite accuracy of discrimination the student is too often indisposed to give, chiefly because he is distracted and confounded with the vast numbers, variety and difficulty of the topics he has to deal with—of the knowledge ever to be yet acquired, and is apt to make eager, and hasty efforts to 'get over the ground'—without pausing to reflect how, or adverting to the possibility of his having to traverse it again. He is perhaps inclined to rest satisfied with a mere glance at his subject, if he can by that means get rid of the individual emergency—and procrastinates thus from day to day, from week to week, from year to year, the task of going a second time over the ground, in order to acquire a better knowledge of it. He may be compared to a glutton, whose object is quantity, not quality,—the greatest quantity devoured in the shortest time."

After the advocate has clarified his ideas as to the points on which he requires the assistance of authorities, he may look for them in appropriate annotated editions of the Code or in the various Law Reports or Digests. It

is generally seen that the practitioners make their selection of authorities to be cited, by a hurried glance through the headnotes of cases as given in the Reports and Digests or reproduced in text-books and annotated editions of Codes. This is obviously a very unsatisfactory method and is fraught with considerable danger. The head-notes are sometimes misleading and in relying solely on them, the advocate runs the risk of citing an authority which has very little or nothing in it to support his case ; or which may even go positively against his contention. Lord Ellenborough said: "It is extremely important where citations are made from the year-books in the abridgments, to look at the cases themselves, from which the *dicta* are imported ; for I have often found that a reference to the original case gives a very different meaning to the passage cited" (14 East. 155). Again, sometimes important principles to be found in the body of the decision are overlooked in the head-notes. Even when they are correct or exhaustive, they do not give an idea of the reasons without which the real import and force of a decision cannot be comprehended. Lord Coke says: "As reason is the soul of the Law, it cannot be said that we know the law until we apprehend the reason of the law." "That head-note is in my judgment, incorrect for the case does not decide any thing of the kind. It is true that Wallis, C. J., in his judgment states that the Privy Council in *Bhuban Moyee* v. *Ram Kishore,* 10 M.I.A. 279 so decided ; but that observation does not appear to be borne out by a study of the judgment of the Privy Council in the case" (*Thripuramba* v. *Venkatarama,* 1923 Mad. 517, 519—*per* Schwabe, C. J. and Wallace J.). "The head-note frequently is misleading if you read it alone and

do not take the trouble to read the case'" (per Lord Fitz-Gerald in *Cooke* v. *Eshelby*, 12 App. Cas. 271, 282). Of course some head-notes embody a fair epitome of the decision, but in any case, it is nothing more than an abridgment without statement of facts or reason.

The better method would be to make a rough selection of cases by referring to the head-notes or summary as given in the Digests or other books and then to carefully go through the original reports. The eminently desirable course is to lay hands on a leading case if there is any, for in it will be found a full discussion of other relevant cases and a statement of the reasons for the doctrine which it has established. The investigation should be pursued by looking into the reports of cases which have been relied on and referred to in the leading case. An examination of subsequent cases on the point is also necessary to ascertain whether the doctrine established in previous cases, has been approved, distinguished, doubted, limited in its scope or negatived. All these cases should be subjected to a thorough analysis and before applying the principles deducible from them, the arguments for and against should be thought out. Cases which are to all appearances against an advocate may be easily distinguishable, or they may have been altogether superseded. The advocate must come ready with a reply by anticipating all possible objections. Surprise will be reduced to a minimum if he takes pains to get himself acquainted with all cases bearing on the point in controversy. Warren says: "But if by his study and industry, the student does not make the reason of the law his own, it is not possible for him to retain it in memory: for though a a man can tell the law, yet if he know not the reason

thereof, he will soon forget his superficial knowledge: but when he findeth the right reason of the law and so bringeth it to his natural reason that he comprehendeth it as his own, this will not only serve him for the understanding of the particular case, but of many others: for *cognitio legis copulata et complicata;* this knowledge will remain with him. Let the student, on discovering any leading case, devote his utmost efforts to the mastery of it, in all its particulars—and make frequent reference to it. If he knows a leading case well, all he has to do, on an emergency, is to turn to it in the list of cases in some approved treatise or digest, and he will find it surrounded by all its kindred and more recent cases. Pursue a similar course with reference to statutes."

When placing authorities before the Court, use must always be made of the original reports of cases and on no account should cases be cited by reference to annotated editions of Codes or similar other books. When giving references, cases must always be cited by their names and not merely the pages of the reports, as most cases are often remembered by their names. There is an interesting story of Lord Esher in this connection. "The Master of the Rolls is always amusing, but he rarely indulges in such homely wit as he did on a recent occasion when a junior before him cited the Law Reports as '2 Q.B.D.' 'That is not the way you should address us', said Lord Esher. The learned gentleman protested that he merely meant to use the brief and ordinary formula for the second volume of the Queen's Bench Division Reports. 'I might as well', retorded him Lordship, "say to you, 'U.B.D.' " (P. M. Gazette; id. L.T. Vol. 102,

April 24, 1897, p. 576; quoted in Dictionary of Legal Quotations).

In order to determine the applicability of a decision to a particular case, it is very necessary to ascertain first, what points are really decided, how much is mere argument and illustration and how much is mere *obiter dictum*. The points of similarity and difference between the reported cases and the case under enquiry must be carefully discriminated. The facts of the reported case must be carefully studied, as it is the facts that in many cases make the difference. In *Keats* v. *Keats*, 32 L.T. 321 Creswell, L.C. said: "There is no greater fallacy than that of carrying an analogy too far, and supposing that because there is a resemblance between two things in one point, they therefore correspond in every respect." The reasonings of the Courts are of great assistance in the appreciation of the legal principles enunciated. The arguments of counsel must be also read, as in some cases the actual decisions have to be ascertained by a reference to the arguments made in connection with the points raised.

Warren says: "The necessity, too, which has been elsewhere alluded to, of rapidly passing from one subject to another, in actual business, is another fertile source of indistinctness and superficiality. Students and young practitioners, not calm and confident in their own resources —not sufficiently stored with accurate and well-arranged information, nevertheless, somehow contrive to find themselves in perpetual bustling activity—ever 'up and doing'. They do little more, for instance, than hastily cast their eye over the marginal abstracts of the New Reports, even of the most important decisions—or deposit

them, it may be, in some text-book, resolving to recur to them at a more 'convenient season'—relying upon finding them there where wanted, ready for use ; and making thus no effort to incorporate each new ingredient with the existing stock of their knowledge. Can it be wondered, at that such people—'Lawyers in haste'—are always confused and overwhelmed. Such persons have a faint recollection on a question being asked which requires a prompt and accurate answer of a particular decision—they 'know there is such an one'—but they are 'not quite sure what was the precise point decided'—'satisfied it was something—nay, a good deal—like the present', etc. etc. A short time ago, a young barrister cited a case in Court very confidently as deciding—so and so ; but on the judge asking him to point out the case, and hand up the report, our friend found, to his unspeakable mortification and alarm, that he has represented the case as exactly the reverse of what it was. The judge looked somewhat distrustfully on the embarassed counsel, admitted his explanation, but cautioned him to look another time before he leaped. Now let our student keep this little instance in view, while dealing with the slippery matters of law. Surely five leading cases, recollected with accuracy, are worth five hundred imperfectly understood. Attentive reading, frequent reflection upon whatever is read, and application of it to business are the only guarantees of distinctness of thought and recollection."

"The force of a precedent resides in the rule of law which it enunciates. But recitals of facts in the judgment, though important as defining the exact boundaries of the legal question upon which the decision turned, do not however constitute a part of the adjudication" (Blackstone,

39). "Their 'lordships cannot help observing that the learned judges of the High Court have fallen into an error in drawing an inference of law in support of their conclusion from a decision which was obviously based on facts different from those with which they had to deal" (*per* Ameer Ali J., in *Forbes* v. *Mahomed Bahadur*, 1914 P.C. 111, 113). "Judgments must be read as applicable to the particular facts proved, or assumed to be proved. The law is not always a logical code" (Beal on Interpretation, p. 16).

In *R.* v. *Baldry*, 1852, 15 Cox. C.C. 525, Pollock, C. B. said: "You need not cite cases that are familiar". Case-worship has its limits and the main thing to rely on is the principle and not the letter of the particular precedent. In *Phillips* v. *Briand*, 1856, 4 W.R. 487, Pollock, C.B. said: "I remember Lord Eldon saying to counsel, 'You have told us how far the cases have gone, will you now tell us where they are to stop?' I think it is now time that we should say where the cases are to stop." Lord Kenyon, said: "The use of cases is to establish principles, I must follow the principles and not the decisions." (*Duke of Leeds* v. *New Radnor*, 1788, 2 Brown's Reports 339). *In Re Holmes*, 1890, L.J. (N.S.) 60 C.D. 269 Kay, J. said: "I cannot bear to be told when an argument has been addressed to me by which I am not convinced, that there is a case decided which I am bound to follow."

In re Hallett's Estate. Knatchbull v. *Hallett*, 1879, L.R. 13 C.D. 712, Jessel, M.R. said:—"The only use of authorities, or decided cases, is the establishment of some principle which the Judge can follow out in deciding the case before him. There is, perhaps, nothing more import-

ant in our law than that great respect for the authority of decided cases which is shown by our tribunals. Were it not for that, our law would be in a most distressing state of uncertainty, and so strong has been my view, that when a case has decided a principle, although I myself do not concur in it, and although it has been only a decision of a tribunal of co-ordinate jurisdiction, I have felt bound to follow it when it is of respectable age and has been used by lawyers as settling the law leaving to the Appellate Court to say that case is wrongly decided if the Appellate Court should so think."

As to the extent to which one case may be used as an authority for another, it is important to remember the well-known words of Lord Halsbury in *Quinn* v. *Leatham*, 1901, A. C. 495 p. 506: "There are two observations of a general character which I wish to make—one is, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expression which may be founded there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what is actually decides. I enterly deny that it can be quoted for a proposition that may seem to follow from it." "A case is an authority for what it actually decides and not for what would seem to flow logically from it, for the law is not always logical at all' (*per* Mitter J., in *Shyama Charan* v. *Sricharan*, 1929 Cal. 337).

When examining the applicability or otherwise of a particular decision, care must be taken to ascertain if the statute has been altered since the publication of

the case. If the statute has been amended or altered, it would be necessary to consider how much of the decision applies. When there are several conflicting decisions of the same Court preponderence of authorities should be taken into consideration in deciding as to their applicability. It is not good policy to rest content with one or two decisions which are in the advocate's favour. The greater the number of authorities, the surer the conclusion that the principles sought to be applied have been firmly rooted in the law. If he hunts for other cases diligently, he will perhaps find that an earlier case which has well laid the principles, was not noticed at all in a subsequent decision. When this is the case the authority of the previous decision cannot be said to have been shaken, merely because there is a contrary later decision. It is not an infrequent thing to find such expressions in the judgments of the High Courts, as "Our attention was not drawn to so and so", or "the case was not fully argued", or "one side was not represented", when re-establishing the principle in a former case. In a recent case (*Hira Bibi* v. *Ramhari*, 5 Pat. 58 P.C.) Lord Darling while reversing a decision of the Patna High Court observed: "They (judges of the High Court) appear to have been unaware of several cases decided on appeal by this Board, and directly dealing with the matter in question. When these cases are considered, it appears to their Lordships that this case it already concluded by authority." A later decision is not necessarily better than an earlier one. In *Pillans* v. *Van Mierop*, 1764, 3 Burr. Part IV., p. 1671, Wilmot, J., said: "Many of the old cases are strange and absurd: so also are some of the modern ones." When a case

has been dissented from or doubted, the more recent one, or the one which is supported by the other High Courts should be given the preference. Where there is a diversity of opinion in the several High Courts, the practitioner should rely upon the ruling of the High Court to which the trying Court is subordinate, as every Judge is bound to follow the rulings of the High Court to which he is subordinate (10 Cal. 82 .p. 84 ; 13 C.L.R. 256 ; 25 Cal. 488 ; 15 Bom. 419 ; 17 Bom. 355).

As to practice and procedure, where the statute lays down a positive rule of practice it must be adhered to even if it causes hardship. The same rule applies to procedure enacted in statutes. In some cases Courts are authoried to make their own rules for the regulation of practice or procedure. They should not be inconsistent with the laws or the fundamental rules of justice. "To pronounce such a judgment *ex parte* when no notice has been given to the opposite side to appear and contest the order, is much the same as to decide a suit against a defendant who has been cited not to appear. The practice, if it is a practice, is quite indefensible" (*per* Lord Dunedin, in *Indar* v. *Kanshi,* 1917 P.C. 156 p. 160). Rules of practice and procedure are established and engrafted in a system of law by a long course of precedents and adjudications –the *cursus curiæ* of the Court. "The practice of the Court forms the law of the Court" (*per* Lord Kenyon, C.J., in *Wilson* v. *Rastall,* 1792, 4 T.R. 757). "I have no authority to alter the practice of the Court" (Lord Langdale, in *Balls* v. *Margrave,* 1841, 3 Beav. 449). "This decision (on a point of procedure) is one of long standing, and has been followed for many

years. Their Lordships see no reason to question it or to hold that this rule of procedure should now be altered" (*per* Lord Sumner in *Radha* v. *Ram Bahadoor*, 1917 P.C. 197, 201). A rule of procedure, which has been laid down as a general rule by Full Benches in all the Courts in India, and acted on for many years, would not be interferred with by the Privy Council (*Brij Indar* v. *Lala Kanshi*, 1917 P.C. 156, 159). But it should be remembered that rules of Court are made for achieving the ends of justice and a too rigid adherence to precedents in matters of practice may sometimes produce the opposite result. "Procedure is but the machinery of the law after all—the channel and means whereby law is administered and justice is reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern where it ought to subserve" (*per* Lord Penzance, in *Kendall* v. *Hamilton*, 1879, A.C. 504, 525). "It is always unpleasant to defeat justice by adherence to technical and arbitrary rules" (dictum of Denman C.J., cited in *Mahabala* v. *Kunhanna*, 21 Mad. 273, 381). The Privy Council observed that "rules of procedure are not made for the purpose of hindering justice" (*Indrajit* v. *Amar*, 2 Pat. 676 P.C.: 1923 P.C. 128). In a recent case in Calcutta, Page, J., observed: "Too often in this country is a suit won or lost because the form has been allowed to swallow up the substance of the case. No doubt rules and regulations are necessary and useful when sensibly applied. But let there be too rigid an adherence to the technicalities of the law and litigation tends to become as uncertain in its event as a game of chance; to the detriment of justice and the

consternation of litigants. This ought not be" (Statesman, Aug. 13, 1927).

In deciding the applicability of a case care should be taken that the *dicta* contained in the opinion is not taken as the actual decision. *Dicta* have their value, specially when they come from Judges of great learning and ability. But what is said by a Judge in his opinion is confined to the particular facts of the case. In relying upon *dicta*, one must be sure that they apply to the facts of the case. Lord Mansfield said: "This mere *obiter* opinion ought not to weigh against the settled direct authority of the cases which have been deliberately and upon argument determined the other way" (*Saunderson* v. *Rowles*, 1766, 4 Burr. Part IV., 2069). In *Cook* v. *New River Co.*, 1888, L.R. 38 C.D. 70, Bowen, L.J. said: "I believe that *obiter dicta* like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarassment in future cases." "How necessary it is carefully to consider the language of learned Judges, especially when you are dealing with language which is admitted to be only a *dictum* and not a decision, and when it is attempted to use that language for the purpose of founding on it an article of a code of law"—*per* James, L.J., in *Dawson* v. *Bank of Whitehaven*, 1877, L.R. 6 Ch. D. 226. In *Ex parte Willey; In re Wright*, 1883, L.R. 23 Ch. D. 127, Jessel, M.R. said: 'I never allow my construction of a plain enactment to be biassed in the slightest degree by any number of judicial decisions or *dicta* as to its meaning, when those decisions or *dicta* are not actually binding upon me. I read the Act for myself. If I think it clear I express

my opinion about its meaning, as I consider I am bound to do. Of course, if other Judges have expressed different views as to the construction, and their decisions are binding on this Court, this Court has simply to bow and submit, whatever its own opinion may be. But when there is no such binding decision, in my view a Judge ought not to allow himself to be biassed in the construction of a plain Act of Parliament (for it appears to me to be plain) by any number of *dicta* or decisions which are not binding on him. The Judge ought with all due respect to examine into them, but he must not allow any number of *dicta,* or even decisions which are not binding on him, to affect his judgment, except in one peculiar case. That case is peculiar, and therefore I will mention it. When a series of decisions in inferior Courts have put a construction on an Act of Parliament, and thus have made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs."

It is needless to say that if authorities have to cited, they must be carefully examined beforehand and only cases which are distinctly in favour of an advocate's contention should be referred to. This is subject to the rule that the Court should never be misled or imposed upon. If a case has to his knowledge been overruled or superseded it should never be cited under the belief that the judge or opponent may not be aware of it. If a case has been dissented from or adversely commented upon in a

later case, it should be brought to the judge's notice, with arguments in favour of the adoption of the ruling which goes to support his case. It is a bad policy to suppress it, for the opponent will in all probability cite it in his favour depriving the advocate of the opportunity of commenting on the advisibility of rejecting it in preference to the case relied upon by him. If the Court enquires of authorities which are against him, the advocate should mention those that he is aware of and explain them. A question has sometimes been debated as to whether an advocate when arguing questions of law, is bound to cite authorities which are against him. The answer is certainly not of easy solution. Generally speaking, it may be said that in contested cases he is not. Of course it is not possible for an advocate to argue effectively or confidently on any question of law without laying his hands on all cases whether for and against. He must have a knowledge of the authorities that go against him in order that he may meet the point of view that will be advanced by his opponent. It is therefore a counsel of perfection to anticipate and touch upon the adverse decisions. But it will be going too far to say that he is bound to cite decisions against him when there is another advocate on the other side to make his own researches and to put his own case. A decision may apparently go against an advocate, although it has no real bearing on the case and ought not to influence the Judge. Can it be said that he is under an obligation to cite such an authority?

Sundara Aiyar says "Personally I would state without hesitation that if the case exactly covers the point he is bound to cite it; but the statement must be subject to limitations. Suppose you know of an American case

against your contention, it may be that there is no duty to cite it. But if you cite decision from America in your own favour, if there is another case exactly covering the same ground, it would be your duty to cite that case also. So also with regard to English cases. But cases which are authoritative decisions and to a certain extent binding on the Courts here, ought to be quoted if the advocate is convinced that they would be relevant" (Professional Ethics, pp. 79, 80).

The rule is however otherwise in the case of *ex parte* suits. Great caution should be exercised when a case is heard *ex parte*. The principle is of universal application (20 W.R. 253). The fundamental principal of law it that plaintiff when he comes to Court must prove his case and he must prove it to the satisfaction of the Court. His burden is not lightened because the defendant is absent ; on the other hand the responsibility is increased in one sense for as observed by Sir Lawrence Jenkins in *Deonandan* v. *Janki,* 44 Cal. 573 P.C., when a matter is heard *ex parte* in the absence of one of the contestants who is not represented, it is the duty of the counsel to bring to the notice of the Court adverse as well as favourable authorities—*per* Mookerjee, J., in *Satyendra* v. *Narendra,* 39 C.L.J. 279.

In this connection it may be observed that while arguing questions of law by referring to decisions, the propositions relied upon should be stated with fairness and accuracy. Sometimes a sentence or a paragraph which is favourable to the advocate arguing, is read, by suppressing the other parts which go against him. Or, it is read so hurriedly or inarticulately as to prevent the judge from understanding it fully. This practice cannot be too

strongly condemned. "During the trial of Aaron Burr, William Wirt felt that one of his opponents had endeavoured to get certain petty advantages by the use of some of the tricks mentioned and he spoke thus: 'I will not, in commenting on the gentleman's authorities, thank the gentleman with sarcastic politeness for introducing them, declare that they conclude directly against him, read so much of the authority as serves the purpose of that declaration omitting that which contains the true point of the case which makes against me; nor, forced by a direct call to read the part also, will I content myself by running over it as rapidly and inarticulately as I can, throw down the book with a theatrical air and exclaim, 'Just as I said', when I know it just as I had not said. I know that, by adopting these arts, I might have a laugh at the gentleman's expense; but I should be very little pleased with myself, if I were capable of enjoying a laugh procured by such means. I know too, that by adopting such arts there will be those standing around us, who have not comprehended the whole merits of the legal discussion, with whom I might shake the character of the gentleman's science and judgment as a lawyer'." (Hardwicke, p. 439).

Opinions expressed in authoritative text books by writers of acknowledged character are sometimes quoted in support of a view, where judicial decisions are wanting. Such opinions by eminent jurists or sages of the professions are entitled to very great weight and afford valuable guides on debatable questions of law. Opinions of writers like Blackstone, Coke, Bentham, Pothier or judges like Mansfield, Eldon, Kenyon have been referred to on numerous occasions. "If it is law, it will be found in

our books. 'If it is not to be found there, it is not law" (Camden, L.C.J. in *Case of Seizure of Papers*, 1765, 19 How. St. Tr. 1066). "I must treat with reverence everything which Lord Kenyon has said; but not everything which text-writers have represented him to have said, which he did not say" (Lefroy, C.J., in *Persse* v. *Kenneen*, 1859, Ir. Rep., L.T. Vol. I n.s. 78). "The expressions of text-writers may however be looked to as evidencing the constant practice of the profession" (*per* Lord Cairns, L.C., in *Alexander* v. *Kirkpatrick*, 1874, L.R. 2 H.L.Sc. 397, 400). As to the opinion of text-writers Lord Alvanley said: "When we find an opinion in a text-writer upon any particular point, we must consider it not merely as the private opinion of the author, but as the supposed result of the authorities to which he refers" (3 Bos. & P. 301; cited in Ram on Judgment p. 167). The reasons assigned give weight to the opinion. If, however, on an examination of the authorities and reasons, it is found that the opinion does not commend itself, it is disregarded. "A passage in a text-book, if the same in its entirety has been most emphatically and judicially affirmed, may be referred to and followed as useful guide, if not as absolute and binding authority" (Vaughan Williams J., in *Townshend* v. *Moore*, 1905 P. 66, 77). In England the convention is that a living author is not cited as an authority, but the rule is not so in America.

Opinions in books of authors elevated to the Bench are sometimes regarded as greater authorities on the same principle by which the *dicta* of eminent judges are given considerable weight. "The attaching more importance to a book from the fact of its author being a judge, either at the time of producing the book, or by subsequent eleva-

tion, admits of these defences: first, from the author being promoted to a judgeship, it may be presumed he was a man of learning and talent; and secondly, the causes which render the *dictum* of a judge, as such, greater authority, than the dictum of any other man, are the same as those which render the *dictum* of a judge in a law treatise more authoritative that would be the *dictum* of any other" (Ram's Legal Judgment, 1871 ed., pp. 166, 167). It is well to bear in mind the remarks of Kekewich, J. in *Union Bank* v. *Munster*, 1887, 37 Ch. D. 51, 54:— "The argument, however, has been almost entirely rested upon one passage in the work Lord Justice Fry on Specific Performance. It is to my mind much to be regretted, and it is a regret which I believe every judge on the bench shares, that text-books are more and more quoted in Court. . . . . I mean, of course, text-books by living authors—and some judges have gone so far as to say that they shall not be quoted. In the preface to this very book we have a warning against it by the learned author. I cannot forbear quoting the words: 'There is one notion often expressed with regard to works written or revised by authors on the bench, which seems to me in part at least erroneous; the notion, I mean, that they possess quasi-judicial authority', and then he gives a reason which must commend itself to all students what that notion is erroneous." The concluding lines in the Preface of Fry's Specific Performance, 2nd edition 1881, are: "It is hardly enough remembered how different are the circumstances under which a book is written and a judgment pronounced, or how much the weight and value of the latter are due to the discussions at the bar which precede the judgment."

Section 3 of the Indian Law Reports Act (XVIII of 1875) says that no Court shall be bound to hear cited or shall receive or treat as an authority binding on it, the report of a case other than a report published in the authorised reports. But it does not prohibit the reception of reports of cases published in private reports. As a matter of fact such reports are being constantly referred to by the Courts. It was held in *Maqbul* v. *Rakhal*, 4 C.W.N. 732 that an unreported case or ruling is not to be treated as an authority. It was dissented from in a later decision where it was pointed out that s. 3 was framed to constitute a monopoly and it did not prevent the Court from looking at an unreported judgment of the same Court (see *Mahomed Ali* v. *Nazar Ali*, 5 C.W.N. 326 : 28 Cal. 289). Unauthorised reports are on the same footing as unreported cases (24 O.C. 319). An unreported judgment is not any the less authority simply because it has not been reported, nor is it so because it has been published in any Report other than the Indian Law Reports. All that is necessary is that the Court should be satisfied about its authenticity. A certified copy of a judgment will therefore serve the purpose if a judgment has not been reported. "All reports made by gentlemen of the Bar, and published on their responsibility, are equally regular. There is no superiority in the reports of the Council of Law Reporting. Counsel are as much entitled to cite the one as the other"—The Master of the Rolls, T.L.R., Vol. 3 p. 640 (May, 20, 1887).

It is superfluous to add that advocates who desire to keep themselves uptodate in their knowledge of law, should regularly read the Law Reports or Journals as they come out. It is not enough to read the Reports,

as it is impossible to store the cases up in one's memory. Recent decisions must therefore be noted in the margin of the books used by the advocate. It may be years before new editions come out.

The arguing of an appeal case is not the same thing as arguing a case before the trial Court. The standpoints are different. It is more difficult to argue an appeal, as the advocate has to attack the reasons given for the settled opinion of the lower Court and to show that it is wrong. There is however this advantage that the two sides of the case have been dealt with in the judgment of the trial Court. But it is not enough to create a doubt in the mind of the Appellate Court. It must be shown that the decision is clearly wrong. "I think it beyond question that it is generally the duty of an appellate Judge to leave undisturbed a decision of which he does not clearly disapprove. I conceive that, in our Court, as in the civil law, it is the rule that 'gravely to doubt is to affirm'—*per* Knight Bruce, L.J. in *The Att. Genl.* v. *Corp. of Beverley,* (1854), 24 L.J. Rep. (N.S.) Part VII, Chan. p. 376. The right of an appeal is a valuable right and great responsibility rests on the lawyer employed in arguing an appeal. It is the last chance of getting redress, if there has been any error or failure of justice. In *Q.* v. *Justices of County of London,* 1893, L.R. 2 Q.B. 492, Bowen, L.J., said: "If no appeal were possible, I have no great hesitation in saying that this would not be a desirable country to live in.....It is quite true that there is enough difficulty in appealing as it is; but if there is to be no appeal at all possible, the system would be intolerable." The opinion of the trial Judge on questions of fact and in the matter of appreciation of

evidence and the credibility of witnesses, is not lightly interfered with in appeal (39 Bom. 386 P.C. ; 43 Cal. 707 P.C. ; 45 M.L.J. 242 P.C. ; 33 M.L.T. 361 ; 15 C.W.N. 717 P.C). But where the trial Judge has approached the evidence from a wrong standpoint and has applied wrong standards of probability or improbability, it is not merely a question of credibility of witnesses and the appeal Court is not obliged to accept the estimate of the trial Judge (47 Cal. 1079).

The view taken by the trial Judge cannot be upset merely because the facts and circumstances of the case justify a different conclusion with equal force. It must be shown that the decision is clearly wrong. In appeal, the burden of showing that the judgment appealed from is wrong, lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on the one side or the other being right, he has not succeeded—*per* Lord Buckmaster, in *Nabakishore* v. *Upendra*, 35 C.L.J. 116 p. 120. See also *Midnapur Zemindary Co.* v. *Umacharan*, 40 C.L.J. 16 ; *Rees* v. *Young*, 66 I.C. 745. A solemn decision of a competent Judge is by no means to be disregarded, and I ought not to overrule it without being clearly satisfied in my own mind that the decision is erroneous"—*per* Lord Langdale, M.R. in *Ward* v. *Painter*, 1839, 2 Beav. 93.

CHAPTER X.

TRIAL OF CRIMINAL CASE—DEFENDING ACCUSED.

The trial of a criminal case presents features some of which are essentially different from the trial of a civil case. In a civil case the parties have their respective burdens of proof, according to the nature of the cases set up by them. But in criminal case the *onus* of establishing the guilt of the accused rests entirely on the prosecution. In a civil case, the burden of proof may shift constantly according as one scale of evidence or the other preponderates, but in a criminal case the burden never changes. In some cases there are presumptions of law which may be drawn, but these presumptions have not the effect of shifting the burden of proof. For instance, it may be presumed that a man who is in possession of stolen goods soon after the theft, is either the thief or has received the goods knowing them to be stolen unless he can account for his possession (S. 114 Evidence Act). But even in this case it is not for the accused to prove honest dealing with the property, but for the prosecution to prove the reverse (*R.* v. *Lewis,* 14 Cr. App. R. 33). The law has been very clearly stated in the well known case of *R.* v. *Schama,* 86 L.J.K.B. 396 where the Lord Chief Justice observed: "Where the prisoner is charged with having recent stolen property, when the prosecution has proved the possession by the prisoner and that the goods have been recently stolen, the jury may be told

that they may, not that they must, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true, it is for the jury to say on the whole evidence whether the accused is guilty or not, that is to say, if the jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal because the Crown has not discharged the onus of proof imposed upon it of satisfying the jury beyond reasonable doubt of the prisoner's guilt. *That onus never changes ; it always rests on the prosecution.*"

It is the boast of the law that a person accused of the most henious offence is presumed to be innocent till his guilt is established by the prosecution by legal evidence. The assasin reeking with the blood of the victim or caught with the weapon in his hand, is entitled to have a fair trial and is presumed to be innocent till he is proved to be guilty. He is not bound to say anything in his defence and the entire burden rests on the prosecution. Lord Ellenborough said: "In a criminal case I can presume nothing" (*King* v. *Brett*, 1806, 5 Esp. 261). The overlooking of this fundamental principle is responsible for many cases of miscarriage of justice in our Court. The weighty words of Ameer Ali and Pratt, JJ., in *Sheo Prokash* v. *Rawlins*, 28 Cal. 594 is worth reproduction:—"The work of this Court would be appreciably lightened if the subordinate magistrates in dealing with the law relating to the rights of accused persons would construe it in a less technical spirit than they are accustomed to do. In the inferior Courts the right principle is occasionally reversed and a person is presumed to be guilty the moment he is accused and every attempt

on his part to prove his innocence is regarded as vexatious."

It is a maxim in law that no man shall be condemned before he is given an opportunity of being heard. Brett, J. said: "I take it to be contrary to the first principles of English jurisprudence and English law that a man should be condemned unheard" (*Lovering* v. *Dawson*, No. 1, 1875, L.R. 10 C.P. 722). In *Q* v. *Dyer*, 1703, 6 Mod. 41 Holt, C.J. said: "It is abominable to convict a man behind his back." Hawkins, J., said: "Every man ought to have the fullest opportunity of establishing his innocence, if he can" (*Q*. v. *Dennis*, 1894, L.R. 2 Q. B.D. 480). Blackstone said: "It is better that ten guilty persons escape than that one innocent suffer."

A criminal case is opened by the prosecution with a short statement of the facts of the crime and an outline of the evidence by which the prosecutor proposes to prove the case against the accused. Much of what has been said in a previous chapter (*ante*—Ch. VI) about opening the case applies here. In *Fursey's case* (1833), 1 St. Tr. (N.S.) 558, Gaselee, J., said: "This case not having opened has thrown a difficulty upon the Court—without presuming to say it ought not to have been the course, considering the state of the matter: I am thinking of the inconvenient situation in which the Court is placed. Parties, I think, should act upon the law as it stands. The usual course is for the counsel for the prosecution to state the facts without reasoning upon them, and such facts as may lead one's attention to that which may be the real question of law in the case. But if a contrary course is to be adopted, and an opening is to be done with-

out, we shall be in great difficulty at the end of the cause."

The prosecuting counsel has a very onerous and responsible duty to perform. His duty is not to secure a conviction but to see that justice is done. He must present the case against the accused in the fairest possible manner. The Crown has a duty to protect the person and property of the people and see that offendors against the law are adequately punished. The prosecution counsel represents the Crown in the discharge of this duty and helps in the administration of criminal justice. While laying before the Court all facts available for establishment of the guilt of the accused, he must also say everything that can be legitimately said in favour of the accused. That is the true function of the public prosecutor. In *E.* v. *Dhunno Kazi*, 8 Cal. 121, Wilson, J. said: "The only legitimate object of a prosecution is to secure not a conviction but that justice be done. The prosecutor is not therefore, free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his power ('in his favour' in the report is a misprint) directly bearing upon the charge. It is *prima facie* his duty, accordingly, to call those witnesses who prove their connection with the transaction in question and also that must be able to give important information. The only thing that can relieve the prosecution from calling such witnesses is the reasonable belief that if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown (and the mere fact of their being summoned for defence seems to us by no means necessarily a sufficient reason), the Court may properly draw an inference adverse

to the prosecution." There is a serious misprint in the report of the above case and an argument was founded on the expression "in his favour" which appears there and it was pointed out by Sir Lawrence Jenkins, C.J. in *Ramranjan* v. *E.*, 42 Cal. 422 that the word used in the original record of the case is not "favour" but "power" and that is how the judgment is reported in 10 C.L.R. 151 p. 153. The duty of the public prosecutor is forcibly pointed out in *R.* v. *Holden*, 1838, 8 C. and P. 609.

Much misconception appears to exist as to the duties of a public prosecutor, and the zeal generally displayed for conviction on the prosecution side also induces the lay public to think that it is his duty to secure conviction. It has been pointed out more than once that the public prosecutor is not to evince the slightest zeal for a conviction. That is no part of his duty. His duty is to put all the facts dispassionately before the tribunal and the jury without omission of a single material fact which may go to establish the charge against the accused or to prove his innocence, leaving it to them to draw their own conclusions. In *Ramranjan* v. *E.*, Jenkins, C.J., said: "If, as we have been told, the conduct of the public prosecutor is in accordance with the general mofussil practice, the sooner the practice is stopped the better. The practice, if it exists, rests on a fundamental misconception of the purpose of criminal trial and the duty of the public prosecutor. That purpose is not to support at all costs a theory, but to investigate the guilt or innocence of the accused, and the duty of the public prosecutor is to represent not the Police but the Crown, and his duty should be discharged fairly and fearlessly, and with a full sense of the responsibility that attaches to his position. The

guilt or the innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else." In *Brahamdeo* v. *E.*, 52 I.C. 241, Das, J., quoted the above weighty words and remarked: "It is the duty of the prosecutor to call every witness who can throw any light on the inquiry, whether they support the prosecution theory or the defence theory. It is for the Court to choose which theory is correct, not for the prosecution. I strongly protest against a doctrine which would reduce criminal trials into a battle of tactics between the prosecution and the defence." It is not the public prosecutor's duty to call only witnesses who speak in his favour. He should, in a capital case, place before the Court all the available eye witnesses, though brought to the Court by the defence, and though they give different accounts. The rule is not a technical one, but founded on common sense and humanity (*Ramranjan* v. *E.*, 42 Cal. 422). An accused in a sessions trial is entitled to have all the witnesses examined before the committing magistrate put in the witness box for examination, unless the public prosecutor discards any on the ground that he will not tell the truth, (*Nagendra* v. *E.*, 27 C.W.N. 820). It is the duty of the prosecution to call all the witnesses who prove their connection with the transactions connected with the prosecution and who must be able to give important information. The only thing that can relieve the prosecution from calling such witnesses is the reasonable belief, that, if called, they would not speak the truth. (*Q. E.* v. *Dhunno Kazi*, 8 Cal. 121 ; see also *Q. E.* v. *Ram Sahai*, 10 Cal. 1070 ; *P. E.* v. *Stanton*, 14 All. 521 ; *Q. E.* v. *Kali Prosunno*, 14 Cal. 245 ; *Muhammad Yunus* v. *E.*, 50 Cal. 318).

It has been seen that the *onus* of proving everything essential to the establishment of an offence is on the prosecution. There is however a qualification of this rule and it is to be found in s. 105 of the Evidence Act. Under this section, when an accused wishes to rely on any of the general or special exceptions or proviso contained in the Penal Code or any other criminal enactment, the burden is on him to prove the existence of circumstances which would show that any of the special or general exceptions, would take out his case out of criminal liability. For instance, an answer setting up the right of private defence, must be supported by evidence (*In re Jamshur*, 1 C.L.R. 62), or where a quack unskilled in surgery causes the death of a patient by surgical operation for curing piles and claims the benefit of s. 88 I.P.C., it is for him to show that he acted in good faith (*Sukarao Kabiraj* v. *E.*, 14 Cal. 566). In a murder case it is for the accused to show that he is protected by one of the provisos to s. 300 I.P.C. (*Garib* v. *E.*, 53 I.C. 495 : 17 A.L.J. 985). The casting of this *onus* does not mean that the accused should lead evidence. The better opinion is that this *onus* may be discharged by the evidence of the witnesses for the prosecution as well as by the evidence for the defence on such a plea being set up ; and the accused is clearly entitled to an acquittal if, on the evidence for the prosecution, it is shown that he has committed no offence (see *In re Kalichurn*, 11 C.L.R. 232 ; *Anandi* v. *E.*, 45 All. 329 ; *Q. E.* v. *Prag Dutt*, 20 All. 459 ; *Mir Alam* v. *E.*, 69 I.C. 454—*Contra*—*E.* v. *Wajid Hossein*, 32 All. 451).

The following general rules have been laid down for the guidance of tribunals when dealing with the serious

question of the guilt or innocence of persons charged with crime :—

(1) The *onus* of proving every thing essential to the establishment of the charge against the accused lies on the prosecution ;

(2) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused ;

(3) In matter of doubt, it is safer to acquit than to condemn ; for it is better that several guilty persons should escape than one innocent person suffer ;

(4) There must be clear and unequivocal proof of the *corpus delicti ;*

(5) The hypothesis of delinquency should be consistent with the facts proved. (Best).

The *corpus delicti i.e.,* the fact that the crime charged has been committed must first be proved. Sir Mathew Hale said : "I would never convict a person of murder or man-slaughter unless the fact were proved to be done, or at least the body found dead." Pollock, C.B., said : "In criminal cases you always begin by proving the *corpus delicti,* and then connect the prisoner with it" (*Q.* v. *Bernard,* 1858, 8 St. Tr. 922 n.s.). But the rule must be taken with some qualification and circumstances may be sufficiently strong to show the fact of the murder though the body has never been found. The strongest possible evidence should be required as to the fact of the murder, if the body were not forthcoming (*Adu Shikdar* v. *Q. E.,* 11 Cal. 635, 642 : 4 W.R. Cr. 19 ; 17 W.R. Cr. 14).

The rules of evidence are the same in civil and criminal cases. In *R.* v. *Burdett,* 1820, 1 St. Tr. (N.S.)

113 : 4 B. & A. 95, Best, J., said : "It has been solemnly decided that there is no difference between the *rules of evidence* in civil and criminal cases. If the rules of evidence prescribe the best course to get at truth, they must be and are the same in all cases and in all civilised countries." "There is no difference between civil and criminal cases as to evidence ; whatever is proper evidence in one case is in the other"—*per* Lawrence, J., in *Stones Case,* 1796, 25 How. St. Tr. 1314. But as pointed out by Best, with regard to the *effect* of evidence in civil and criminal cases, there is this marked difference, that in civil cases a mere preponderence of probability, due regard being had to the burden of proof, is, a sufficient basis of decision : but in the latter, specially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The pursuation of guilt ought to amount to a moral certainty, or "such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt"—*per* Parke, B. The expression "moral certainty" is here used in contradistinction to physical certainty or certainty properly so called ; for the physical possibility of the innocence of any accused person can never be excluded. (Best on Evidence, s. 95).

The "moral certainty" required in a criminal case is not merely a preponderence of probability. Probability means "the appearance of truth or likelihood of being realised which any statement or event bears in the light of present evidence" (Murray's Eng. Dic.). Probabilities in some cases, may create mere suspicion. In *Sreeram* v. *Gopal,* 11 M.I.A. 28, the Judicial Committee observed : "Undoubtedly there are in the evidence circumstances

which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the appellant ; but in matters of this description it is essential to take care that the decision of the Court rests, not upon suspicion but upon legal grounds established by legal testimony." In dealing with a case depending largely on circumstantial evidence, the rules specially applicable must be borne in mind. There is always the danger in a case like the present that conjecture or suspicion may take the place of legal proof, and therefore it is right to recall the warning addressed by Baron Alderson to the jury in *R.* v. *Hodge*, 2 Lewis C.C. 227 (1838) where he said "the mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole, and the more ingenious the mind of the individual, the more likely was it, considering such matters, overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete" —*per* Jenkins, C.J., in *Barindra* v. *K. E.*, 14 C.W.N. 1114. In the same case he observed: "The rules of evidence cannot be departed from because there may be a strong moral conviction of guilt ; for a Judge cannot set himself above the law which he has to administer or make it to mould it to suit the exigencies of a particular occasion" (14 C.W.N. 1114, p. 1143).

It has been pointed out before that in a criminal trial an accused is entitled to the "benefit of doubt." This is a rather elastic expression. A God fearing man unaccustomed to the ways of the world might say that nothing can dispel his doubts unless there be positive evidence of

guilt. Absolute certainty amounting to demonstration is seldom attainable in the affairs of life and all that we can do is to act upon the highest degree of probability available. What is meant is this that the conviction of mind must amount to a *moral certainty i.e.*, a degree of certainty which convinces the mind as reasonable men beyond all reasonable doubt. "Reasonable doubt" is not the same thing as the fastidious doubt of hypercritical mind. Reasonable doubt is the doubt which arises in the mind of a prudent man of business after considering all the facts and circumstances, when dealing with the serious affairs of life. The Indian Evidence Act has adopted the requirements of the prudent man as an appropriate concrete standard by which to measure proof (see s. 3 definition of 'proof').

Circumstantial evidence is sometimes of great importance in criminal cases. In many henious crimes, it is the only evidence obtainable. It furnishes link in the chain of facts that go to establish the guilt of the accused and makes inference possible. It is a fundamental principle of universal application in cases dependent on circumstantial evidence, that in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt (*Hurjee Mull* v. *Imam Ali*, 8 C.W.N. 278, p. 286 ; *Raghunandan* v. *E.*, 59 I.C. 858). Otherwise the accused must be given the benefit of doubt (*Daulat* v. *E.*, 77 I.C. 600).

The defence of a prisoner is always a matter of grave anxiety to the advocate who is engaged for the purpose. Whether it be a trivial case of assault or a serious crime,

the advocate must prepare himself thoroughly with the facts of the case and scrutinise the procedure and form of the trial. In a recent case C. C. Ghose, J., referred to the celebrated defence of Queen Caroline by Lord Brougham and said: "Entire devotion to the interests of the client, warm zeal in the maintenance and defence of his rights and the exercise of his utmost learning and ability, these are the points which can satisfy the truly conscientious advocate" (*Bazlur* v. *E.*, 1929 Cal. 1). The importance of preparation has already been discussed in a previous chapter (ante p. 41) and most of what has been said there apply to the conduct of defence in a criminal case. Criminal cases are not generally burdened with intricate questions of law and in the majority of cases there is but one issue—guilty or not guilty. The efficient handling of a criminal case therefore rests on a complete mastery of the facts and circumstances of the case. The advocate will seldom get at the real situation if he depends on the narration of facts by the accused. If things were left to himself, he would probably say nothing of importance but a bare denial and would paint the prosecutor in the blackest colour. His friends will give a garbled version of the event in their anxiety to shield the accused. The advocate must cross-examine them fully till he has been able to get at the facts which are necessary to build his theory of the case. An accused person is always suspicious of his lawyer, and generally takes care to suppress from the advocate facts that go against him, lest they may come to the notice of the Court. Sometimes, though innocent, he may have reason for non-disclosure of facts to prevent publicity of some scandal or to protect the reputation of

a third person. The advocate will no doubt respect his feelings in such matter, but it is essential that he must learn the real facts in order to strike out a probable line of defence ; just as a physician cannot diagnose correctly or choose the proper remedy, unless a clean breast is made of all facts about the patient's disease.

After all the material and available facts are obtained, the next thing to do is to ponder how best they can be made use of. The strong points must be eliminated from the weak ones and the objections that may be urged against the defence theory must be anticipated and met. At the actual trial it may not be necessary to rely on all the points he has thought out. Those that will help him most will be apparent to him after the prosecution case in opened and closed. The prosecution witnesses may have made statements in favour of the defence case ; the prosecutor himself may have given away during cross-examination on material points. A point which appeared to the advocate strong may have lost its force, or an apparently insignificant point may have sprung into prominence on account of its connecting link with another point. It may also be necessary to formulate new points in the light of the prosecution evidence. The advocate must keep a vigilant eye over the proceedings and occasions will arise when he may have to throw himself on the resources of the moment in determining a particular line of action. When he has a number of points, it is better to urge the strong ones first and to abandon the rest, if he feels that they have produced the desired effect. If he is fairly certain that the wind blows in his favour, he may dismiss the other points by simply enumerating them casually, and the consciousness that that there were other points in

favour of the accused which could have been urged will deepen the conviction of the tribunal or the jury.

No point is too small or technical in a criminal case. An apparently trivial or technical point may sometimes produce an unexpected result. The advocate is defending a prisoner and he will be failing in his duty if he overlooks a single point, however small, which may after all form a connecting link to a chain of facts in establishing the innocence of the person. This must not be mistaken for niggling at insignificant points or propounding inconsistent theories which instead of clarifying the ideas make confusion worse confounded. There are lawyers who being unable to put their cases properly either on account of insufficient preparation or incompetence, adopt the device of producing a state of bewilderment by all sorts of arguments and points with the object of creating some doubt. This tactics may succeed in some cases but it is bound to prove disastrous in the long run.

Lawyers should be very careful when making admissions in criminal cases on behalf of the accused, as the responsibility for admissions is enormous. The onus is on the prosecution to prove all ingredients essential to the establishment of the offence. In England the rule is that in criminal proceedings no admissions preliminary to the trial can ordinarily be made by the defendant or his advisers so as to dispense with oral evidence and strict proof of facts necessary to be proved. When the plea is not guilty, in cases of misdemeanous the defendant or his counsel may at the trial make other admissions of facts ; but in cases of felony no such admissions can be made. Hals. Vol. IX, p 750). It was pointed out in *R.* v. *Bertrand,* 4 Moo. P.C. 460 : 10 Cox. C.C. 618, that "a

prisoner can consent to nothing." In *R.* v. *Thornhill*, 1838, 8 C. & P. 575 Lord Abinger said: "In a criminal case on the Crown said of the assizes, I cannot allow any admission to be made on the part of the defendant, unless it is made at the trial by the defendant or his counsel." In *Q.* v. *Kazim*, 17 W.R. Cr. 49 it was held that admissions made by a prisoner's vakil cannot be used against the prisoner. But in *Q.* v. *Gogalo*, 12 W.R. Cr. 80 it was held that a fact may be admitted by a prisoner's counsel and that such admission would dispense with proof of the fact. In *Q.* v. *Surroop Chander*, 12 W.R. Cr. 76 it was said that "so far as prisoners can assent to anything that arrangement was assented to by the vakils of each party." These cases were decided before the passing of the Evidence Act I of 1872. The language of s. 58 of the Evidence Act is general and there is nothing in it to restrict its application to civil cases only (see authors Law of Evidence, 4th Ed. p. 407). In a case of murder it is better not to take admissions from the counsel for the defence at all. Every fact ought to be strictly proved on the record (Knox & Walsh, JJ., *Sheonarain* v. *E.*, 58 I.C. 457).

In this connection it may be pointed out that there is a danger of the accused himself making incriminatory statements during the Court's examination of the accused. Under s. 342 (1) of the Cr. P. Code, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of the trial without previously warning him put such questions as it considers necessary and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and

before he is called on for his defence. This section is undoubtedly meant for the benefit of the accused, but if the spirit of the law is not strictly adhered to, the accused may be entrapped into making statements which will lead to his conviction. It may also injure him if no explanation is given. It has been held in some cases that though it may be desirable to put before the accused succinctly the main points which appear to go against him or the points which require explanation, it is a substantial compliance with the provision of s. 340 to ask a formal question in general terms (e.g., What is your defence?) giving the accused an opportunity of making a statement as to his defence, since it enables the accused to explain away circumstances appearing in the evidence against him. In another series of cases it has, however, been held that under s. 342 a general question is not enough, but the Court must question the accused in such a way as to enable him to know what points are in the opinion of the Court against him or what points require explanation (see *Bokhari* v. *E.*, 1924 Pat. (C.W.N.) 198; *Raghu Bhunoj* v. *E.*, 21 Cr. L.J. 705; *Fatu* v. *E.*, 21 Cr. L.J. 417). In 21 Cr. L.J. 417 Dawson Miller, C.J. & Adami, J., said: "In the present case, it does not appear that any question whatever was asked of him or that his attention was directed to any portion of the evidence which might appear to call for an explanation and in these circumstances it seems to us that the trial was entirely irregular and that the verdict cannot stand." The question has been very fully dealt with by M. N. Mukherji, J., in a recent case (*Alimuddin* v. *E.*, 40 C.L.J. 101) and it has been pointed out that a general question as to whether the accused wished to say anything does not fulfiil the object

of the law. It may not be possible for every Court to conduct this examination with the same skill, but it has been repeatedly emphasised in various decisions that the examination should not be of an inquisitorial nature. As Mukherji, J. has very rightly pointed out in the above case: "In such examination every precaution should be taken not to entrap him to make incriminatory answers and all questions in the nature of cross-examination should be avoided." The object of s. 342 has been clearly stated in the Report of the Select Committee of the Bill of 1882, viz. "It was never intended that the Court should examine the accused with a view to elicit from him some statement which will lead to his conviction." The judgment of Rankin, J., in *Pramathanath* v. *E.*, 27 C.W.N. 389 p. 406 contains an exposition of the object of the section. In some cases the examination reached the level of cross-examination to the prejudice of the accused and exception was taken by the High Courts. Magistrates therefore are on the *qui vive* for dangers and usually keep themselves on the safe side by asking such general questions as "What is your defence?" It has been held in some cases that this is a sufficient compliance with the section as it gives him an opportunity of making whatever statement he likes. (See *Rez Muhammad* v. *E.*, 90 I.C. 294). The better course would undoubtedly be to strike a golden mean, if that can be done without embarassing the accused. He may not always know what facts may in the opinion of the trial court appear to go against him or may require explanation. If an examination is done by the Court, the advocate must be very watchful of it and he should take every precaution to see that the power of the Court is not consciously or un-

consciously abused and the accused is not entrapped into making incriminatory answers. The remarks of Best on the point are well worth reproduction. "The functions of tribunals are primarily and essentially *judicial* and not *inquisitorial*. Admitting that *special* interrogation of accused persons might in some cases extract truth which otherwise would remain undiscovered, the law is fully justified in rejecting the use of such engine, if on the whole prejudicial to the administration of justice. The sort of interrogation, even when conducted with the most honest intention, must, in order to be effective, assume the shape of cross-examination, and consequently involve the judge in an intellectual contest with the accused,—a contest unseemly in itself, dangerous to the impartiality of the judge, and calculated to detract from the moral weight of the condemnation of the accused, though ever so guilty. In gladiatorial conflicts of this kind, the practised criminal has a much better chance of victory than an innocent person, embarassed by the novelty and peril of his situation. But where the judge is dishonest or prejudiced, the danger increases immeasurably. By artful questioning and working on their feelings, weak-minded individuals can be made to confess or impliedly admit almost everything ; and to resist continued importunites to acknowledge even falsehood requires a mind of more than average firmness. In short judicial interrogation, however plausible in theory, would be found in practice a *moral torture* scarcely less dangerous than the physical torture of former times, and, like it, unworthy of a place in the jurisprudence of an enlightened country" (Best on Ev. 11th ed. pp. 542-543).

In criminal cases, specially in offences involving flagi-

tious crimes, never examine any witness on the defence side unless you are sure that it is absolutely necessary to establish a material point or to offer an explanation on a point which you have a duty to meet. In a capital case it is a great mistake to call witnesses. Such a procedure is attended with considerable risk. The burden of establishing the guilt of the accused beyond reasonable doubt is entirely on the prosecution and the indiscreet examination of witnesses on the off chance of making a favourable impression may result in an unexpected turn of events which will aid the prosecution. If it is at all thought necessary to examine witnesses, the choice must be restricted to those who are expected to say distinctly in the accused's favour and whose credit cannot be easily impeached. It is common experience that a large percentage of cases are ruined by producing witnesses who though they are of little or no help to the defence, strengthen the case for the prosecution. If therefore the circumstances justify the examination of witnesses, examine as less a number as is possible. Too many witnesses on the same point increase the risk of contradiction, however honest or truthful they might be. Sometimes a witness called to testify to a minor point which could have been well ignored, lets in very damaging things in his cross-examination for which you were not at all prepared. Clients' wishes in this respect should be entirely ignored. They generally labour under the delusion that the numerical strength of the witnesses on the prosecution side should be balanced by the same number of witnesses on the defence side. They seldom take into account or can appreciate what the prosecution witnesses have said. Complacency in a matter like this, can never be justified, and

it is better to displease a client or to lose him altogether than to surrender your judgment. You are not the agent of the man who employs you and you must adopt the course which appears to you best. Best, C. J. said: 'I cannot allow that the counsel is the agent of the party' (*Colledge* v. *Horn*, 1825, 3 Bing. 121).

The same mischief may be produced by indiscreet and reckless cross-examination of prosecution witnesses. Cross-examination is undoubtedly one of the most powerful weapons for exposing falsehood and eliciting truth, but cross-examination in criminal cases is an extremely dangerous thing. Unskilful or unnecessary cross-examination digs the grave of many cases, which but for the mistake would have leaned on the side of victory. Besides natural aptitude, it requires considerable experience to become a good cross-examiner. Before you frame your question you must probe the witness's thoughts and ascertain what is passing in his mind. You must forestall his reply and be ready with the next question so that you may baffle him by anticipating. If you are a beginner, your inexperience is no excuse, if instead of observing silence you put questions haphazardly without caring in the least for the serious consequences that they might entail. If you do not know what to ask or how to ask, you can at least serve your client by keeping silent and dismissing the witness after putting a few common place questions by way of feeler. Silence in such moments is more beneficial than pursuing a roving cross-examination which is fraught with great danger. A single injudicious question will push your case to a fathom beyond the possibility of rescue. A fondness for getting contradictory statements is to a great extent responsible for needless

cross-examination. Contradictions on trivial or collateral points or points not in issue are of no help, unless they support the theory of the case. Every question must have some object in view and never cross-examine more than is absolutely necessary. Baron Brampton (formerly Sir John Hawkins) in his Reminiscences (Vol. II p. 25) while speaking of Sir Alexander Cockburn (afterwards Chief Justice of England) says: "He was a great cross-examiner, not because he always perceived the right points, but because he never made a mistake in arriving at them. A cross-examiner cannot be first-rate who makes mistakes in that art, for the art is gone when mistakes appear. At all events, such is my opinion. *Cross-examination is a performance that will never tolerate mistakes.*" Cross-examination is a double-edged tool and seldom is there any such thing as harmless cross-examination. If it does not help you, it may very well injure you. Questioning a witness for question's sake or for winning the applause of the spectators is a dangerous game. The following remarks of Mr. Justice Walsh well illustrate the point: "In my short judicial experience I have adjudicated in more than one case where the death sentence had to be confirmed, in which the conduct of the cross-examination had resulted in the proof of facts or statements, palpably true and elicited quite unexpectedly from witnesses who had never volunteered the information and could not have been coached into it, which have just provided what was wanted to complete the case for the prosecution. In a criminal case, silence is sometimes more than golden." (Walsh's Advocate, p. 167). Numerous other judges will testify to the above fact if they are asked about it. In a recent case Terrell, C.J., made the following signi-

ficant observations: "It is no new experience to note that the art of advocacy is not practised in the defence in lower courts in such a manner as to lead most directly to the acquittal of the client. Instead of seeking out the main points of the defence and in seeking to establish this by cross-examination, the cross-examination wanders about wholly irrelevant matters and the real criticism of the evidence for the prosecution is to be obtained by looking at the evidence in chief. The evidence given in cross-examination is not of the slightest value in the interest of the accused person" (*Raj Kumar* v. *E.*, 1928 Pat. 473, 475).

When a case is to go up for sessions trial, it is prudent in most cases not to cross-examine the prosecution witnesses before the committing magistrate. This is a piece of advice which should be always remembered. If the caution is disregarded, the advocate will very soon find that he has by his cross-examination given such a turn that no human power can rectify. It is generally not safe to disclose the defence at this stage as the prosecution is bound to take advantage of it, if the case goes up. Cross-examination of prosecution witnesses at the preliminary investigation is a dangerous procedure, and should never be followed unless the advocate is very sure of his ground. It is only a very skilled advocate who can ascertain whether there is any reasonable chance of securing a discharge at the preliminary stage. Harris says: "With a very few exceptions, no cross-examination should be administered when the case is to go for trial. Instead of this course being pursued, a long cross-examination is often indulged in, or the young gentleman who thinks he is defending, puts as many questions as he can, under the

impression that questioning is cross-examination, and then answers are elicited detrimental if not destructive to every chance of acquittal. For the purpose of convicting unfortunate wretches who are charged with offences, the Government need not establish public prosecutors while young advocates defend, for these gentlemen can administer questions which the law forbids the prosecuting counsel to ask ; and what is more, they *can privately* question the prisoner, and then by giving the information so obtained in the shape of questions to the witnesses, may display a knowledge of circumstances only consistent with the prisoner's guilt, as by showing that he was present at the scene of the crime, when probably the defence is to be an alibi!" At the same time there may be cases when a hit here and there in cross-examination may disclose the real facts and secure a discharge at the preliminary stage and thus save the anguish and privation of a long trial. But as said before, the task should not be entrusted to a lawyer new in the profession. Discharges have been obtained in this manner in offences involving serious charges. Some men labour under the delusion that in the case of serious crimes triable by sessions court, the evidence led on the prosecution side is bound to be considered as *prima facie* for the purpose of commitment and the magistrate would not take the responsibility of discharging the accused even if the prosecution case be demolished by cross-examination. This sentiment is also shared by many magistrates who seem to think that whenever cases involving serious charges come up before them for inquiry, their hands become tied and the least they can do is to shift the responsibility on to the higher Court. They think that at that stage they have no power to

consider the credibility of the witnesses and as there is *some* evidence the case must go to the sessions court. The law, however, is not so, and many reckless commitments have led the High Courts to emphasise more than once that the committing court has full discretion and power to weigh the evidence and to determine whether the prosecution evidence is worthy of credit. If he is of opinion that the evidence is untrustworthy, he is bound to discharge the accused, but if he entertains any real doubt as to the weight or the quality of the evidence, the task of resolving that doubt should be left to he sessions court. "To hold that, where there is some evidence, however untrustworthy in the magistrate's opinion, he is bound to commit a person for trial will be to make the preliminary enquiry a mere matter of form"—*per* Kumaraswami Sastry, J. in *Re Ponniah Thirumalai,* 65 I.C. 993 : 42 M.L.J. 49. It is open to a deputy magistrate to form his opinion with regard to the credibility of the witnesses called before him. If a *prima facie* case is made out, he should clearly leave it to the jury at the sessions to form their own view as to their credibility of the evidence. But if after hearing the evidence, he is satisfied that it is not trustworthy and that a conviction will not result, he is entitled to record a finding that the witnesses who spoke in support of the charge cannot be believed and that a conviction will not result; *Tarapada* v. *Kalipada,* 28 C.W.N. 587 : 51 Cal. 849 (see also 46 All, 537 : 81 I,C. 913 ; 68 I.C. 825 : 4 Lah. 69 ; 62 I.C. 586).

Verdict against a client is bound to come, unless an advocate chooses to accept only winning cases. An advocate would not be worthy of his profession if he makes

a choice in cases—no one ever does. His business is to offer his services to any one who may come for help. Some cases are so hopelessly bad that no tact or skill can save the accused. He will have done his duty, if he fought hard and awaited the result with composure. He can in these cases minimise the severity of the sentence by avoiding heat during the progress of the trial and evoking sympathy of the tribunal by drawing attention to the mitigating circumstances, unless the crime is a cold-blooded one. The advocate will instinctly perceive in some cases that the defence suggested is untrue, and if he is reasonably certain of it, the sound policy would be to advise to plead guilty. But this advice is sure to be rejected in most cases and persistency in a matter like this is certain to create distrust. Acquittals have sometimes resulted in cases where circumstance pointed to a verdict of guilty. If after the advocate has given out his mind, the client persists in his innocence, he must enter the fight with all the earnestness he can command. An advocate has no right to disbelieve his client, nor has he the right to judge. If he thinks otherwise, it is at best a mere belief. "A man's rights are to be determined by the Court, not by his attorney or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, I want your advocacy, not your judgment ; I prefer that of the Court"—*per* Bramwell, B. in *Johnson* v. *Emerson,* 1871, L.R. 6 Ex. 367. In the Law Notes 1899, Lord Halsbury said: "If an advocate were to reject a story because it seemed improbable to him, he would be usurping the office of the Judge, by which I mean the judicial functions, whether that function is per-

formed by a single man or by the composite arrangement of Judge and Jury."

The question has sometimes been asked, ought an advocate defend a man who has confessed his guilt to him? If the accused confesses his guilt before he takes up the case, it is certainly desirable that he should ask the accused to go to another lawyer. Apart from the ethical aspect of the matter, an advocate with the knowledge of the guilt of his client will be embarassed at every step in conducting the defence. Belief in the innocence of a client is a source of power, but knowledge of guilt is bound to take away that earnestness which is essential to the defence of a cause. Different considerations may arise when a confession of guilt has been made during the progress of trial. An extremely difficult case was that of *R. v. Courvoisier,* (1840, 9 C. & P. 362), where Lord Russel's valet Courvoisier was charged with murdering his master. The man was defended by Phillips, and on the second day of trial, the sudden discovery of a damaging piece of evidence so unnerved the accused that he confessed his guilt to his lawyer, but nevertheless entreated him to defend. This unexpected turn of event, embarassed the counsel beyond measure, and he sought the advice of another Judge, Baron Parke who gave the opinion that since the accused wished himself to be defended, Phillips should not desert his client in the midst of the trial and should use all arguments that might be legitimately made in favour of the accused. The case was being tried by Tindal, C. J. and Baron Parke without divulging the fact to the Chief Justice was present in Court to hear Phillip's address. This case aroused much controversy at the time and opinions were expressed one way or the other.

Phillips is alleged to have obtested during his argument to prove the innocence of his client. The better opinion appears to be that Phillips did what was right under the circumstances and Baron Parke who was present in court said that Phillips said nothing objectionable during the address and that he confined himself strictly to what could be legitimately said in favour of the accused.

A remarkable event occurred recently during the trial of a murder case in the Calcutta High Court and the conduct of two barristers who appeared for the accused was the subject of much adverse criticism. The accused Barendra Ghose was charged under Ss. 302 and 394 I. P. Code. According to the Judge (Page, J.) the counsel saw him in his private room two or three days before the hearing and "informed me that after careful consideration they were satisfied that there was no defence to the charges and that the accused was guilty. They asked me if the accused pleaded guilty to murder whether I would treat him leniently. I told them that I could give them no information as to what I should do at the trial, but if they were satisfied that the accused was guilty, while it was their duty by cross-examination to test the accuracy of the witnesses for the Crown, that they were not entitled to set up any substantive defence in opposition to the case for the Crown." The case was tried by the same Judge and the accused whose plea was 'not guilty' was defended by the same counsel. It ended in a conviction for murder and there was an application for review on the certificate of the Advocate-General. The two counsel submitted a statement saying among other things that "they told the Judge that they had not seen their client yet, but had gone through the brief and thought it was a difficult case ;

and subject to what the client had to say to them, they wished to ascertain from the learned Judge beforehand if he would accept a plea of guilty under s. 394 I. P. Code, and be ready thereafter to let the charge under s. 302 I. P. Code be withdrawn against the accused." Mookerji, J., pointed out that the circumstances were quite different from Phillip's case and condemned very strongly the conduct of the counsel. He observed:—"I regret to place on record my conclusion that I cannot accept the statements made by the learned counsel as correct in all particulars. . . . . The object of the counsel, who sought and secured the interview with the trial Judge must have been to bargain with him as to the sentence in respect of the charge under s. 302, if the prisoner should plead guilty to that Court. The gravity of their misconduct cannot in my judgment be exaggerated. But for what has actually happened, I would have considered it inconceivable that counsel, who have been engaged to defend a prisoner charged with murder, should proceed to intimate to the trial Judge that, in their opinion, there was no defence to the charge, or, as they euphemistically express it, that their case was 'difficult'; and should then endeavour to persuade the Judge, before he has heard the evidence, to agree to a particular sentence if the accused should plead guilty. It would be wrong for me to conceal that my surprise is intensified when I find that the trial Judge who has thus been approached and placed in possession of the view taken of the case by the counsel for the defence, advises them how the defence should be conducted." If an advocate who has lost faith in his client's case communicates to the Judge that he has no defence and tries to bargain with him upon the question of sentence if he

pleaded guilty, he is not only guilty of grave unprofessional misconduct, but he puts the Judge in an extremely embarassing position. On this point Mookerji, J., observed:—"This much appears to me to be incontestable that it is not his duty to approach the trial Judge and to apprise him that in his opinion the man, whose fate has been entrusted to his care, has no defence to make. I venture to add that if, as trial Judge, I had been placed in such a predicament, I would without hesitation, have reported to counsel concerned to the Chief Justice for disciplinary action, and I would have asked to be relieved of the duty of participating in the trial and of passing sentence upon a man whose counsel had previously assured me that there was no defence to make." (*Barendra* v. *K. E.*, 28 C.W.N. 170). In 1915 the General Council of the Bar were asked to advise on the propriety of counsel defending on a plea of "not guilty" a prisoner charged with an offence capital or otherwise, when the latter has conferred to counsel himself that he did commit the offence charged. The report of the Council is to found in the annual statement 1915, p. 14. The following extract from the report is taken from the Annual Practice: "If the confession has been made before the proceedings have been commenced, it is most undesirable that an advocate to whom the confession has been made should undertake the defence, as he would most certainly be seriously embarassed in the conduct of the case, and no harm can be made to the accused by requesting him to retain another advocate."

"Other circumstances apply in cases in which the confession has been made during the proceedings, or in such circumstances that the advocate retained for the

defence cannot retire from the case without seriously compromising the position of the accused."

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As to the address on behalf of the accused after the close of case on both sides enough has been said in the chapter dealing with argument (*ante* p. 180). The advocate should throughout keep a cool head and argue the salient points with all the eloquence and earnestness he can command. Exaggeration or embellishment should always be avoided. A too frequent appeal to emotion without solid facts in support of the defence theory cannot make any permanent impression. No point is too technical or small in a criminal case. In *Martin* v. *Mackonochie*, 1878, L.R. 3 Q.B. 775 Cockburn, C.J., said: "In a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings *in pœnam* are, it need scarcely be observed, *strictissimi juris*; nor should it be forgotten that the formalities of law, though here and there they may lead to the escape of an offender, are intended on the whole to insure the safe administration of justice and the protection of innocence, and must be observed. A party accused has the right to insist on them as matter of right, of which he cannot be deprived against his will: and the Judge must see that they are followed." If any attempt is made on the opposite side to found any argument on facts not on record, a vigorous protest should be made at once. The main facts in favour of the accused should be prominently brought forward, and the facts in opposition to the probability of the case should be fully discussed. If any motive is suggested, it should be appropriately dealt with. An advocate defending a prisoner is in

a better position that the lawyer for the defendant in a civil case. He can expect some license when defending an accused and also sympathy. "The natural leaning of our minds is in favour of prisoners ; and in the mild manner in which the laws of this country are executed, it has been a subject of complaint by some that the Judges have given way too easily to mere formal objections on behalf of prisoners, and have been too ready on slight grounds to make favourable representations of their cases"—*per* Lord Kenyon, C. J., in *R.* v. *Suddis*, 1800, 1 East, 314. The same learned Judge said in another case: "I have been reminded that I sit here as counsel for the defendant. I certainly do so, so far as to interpose between him and the counsel for the prosecution, and to see that no improper use of the law is made against him, and that no improper evidence is given to the jury: but the Judge has another duty to perform, which is that of assisting the jury in the administration of justice." (*Wakefield's Case* 1799, 27 How. St. Tr. 736).

The question of sentence is always a very dificult matter. No duty is more difficult than apportioning the punishment to the particular circumstances of a crime. It is no doubt a matter for the Judge, but the advocate cannot be altogether indifferent to it. When a conviction is apprehended, the advocate should address the Court also on the question of sentence and sum up the points in favour of a lenient punishment. The motive of the crime, the manner in which it was committed, the circumstances under which the accused was drawn into it, the uncontrollable provocation that may have been given to the accused and many other things are objects of study both to the Judge and the advocate. There can be no fixed principles

upon which punishments may be awarded. Opinions vary and on the same facts ten persons would come to as many different conclusions. There should not be severe punishment for trifling offences or for first offences, specially by young persons. Reformation of the criminal, deterring the offender from repeating the offence, warning to the general public and corporal suffering for what the offender has done, are some of the objects of punishment. The law lays down the maximum punishment that can be awarded, and the exact amount to be meted out must be determined by the peculiar circumstances of each case. Of course there are some crimes for which the extreme penalty must be awarded by the tribunal, e.g., cold blooded murder or dacoity, rape upon an undefended woman, killing a child for its ornaments by a servant committed to his care &c. &c. The question of commutation of sentence is one for the appellate court. If it is an atrocious crime committed with deliberation, the trial court is bound to award the extreme penalty imposed by law. In some cases the trial judge being unable to give any sentence other than death, recommends the condemned man to the appellate court for mercy. The Crown can also grant reprieve in suitable cases. The infliction of a disproportionate sentence creates a feeling of sympathy for the accused and this frustrates the object of law. It also takes away all chance of reformation. A ridiculously light sentence is also open to the same charge.

Tht following observations of Baron Brampton who had a very distinguished career both at the Bar and on the Bench are instructive :—

"The sentence of another Judge upon another prisoner ought not to be followed, for each prisoner should be punished for

nothing but the particular crime which he has committed. For this reason the case of each individual should be considered by itself.

"I dislike, also the practice of passing a severe sentence for a trifling offence merely because it has been a common habit in other places or of other persons; for instance, I have known five years of penal servitude imposed for stealing from outside a shop on a second conviction, when one month would have been more than enough on a first conviction, and two or three months on a second conviction. For small offences like these the penalty should always be the same in character—I mean a not excessive imprisonment, and never penal servitude. As often as a man steals let him be sent to prison; and it may be for each offence the time of imprisonment should be somewhat slightly increased, but not the character of the punishment.

"Years ago in my Sessions days, I remember a poor and, I am afraid, dishonest client of mine being *transported for life* (on a second conviction for larceny) for stealing *a donkey;* but I doubt if that could happen nowadays. It seems incredible.

"The course I adopted in practice was this: My first care was never to pass any sentence inconsistent with any other sentence passed under similar circumstances for another though similar offence. Then I proceeded to fix in my own mind what ought to be the outside sentence that should be awarded for that particular offence had it stood alone; and from that I deducted every circumstance of mitigation, provocation, etc., the balance representing the sentence I finally awarded, confining it purely to the actual guilt of the prisoner.

"Except for special peremptory reasons, I never passed sentence until I had reconsidered the case and informed my own mind, to the best of my ability, as to what was the true magnitude and character of the offence I was called upon to punish.

"The effect of such deliberation was that I often mitigated the punishment I had intended to inflict, and when I had proposed my sentence I do not remember ever feeling that I had acted excessively or done injustice. I am now quite certain that no

sentence can be properly awarded unless after such consideration. I speak, of course, only of serious crimes.

"The most glaring irregularities, diversity and variety of sentences are daily brought to our notice, the same offence committed under similar circumstances being visited by one Judge with a long term of penal servitude, by another with imple imprisonment, with nothing appreciable to account for the difference.

"In one or, the other of these sentences discretion must have been erroneously exercised. I have seen such diversity even between Judges of profound learning in the law who might not unreasonably, *prima facie*, be pointed to as examples to be followed; and so they were, so far as regarded their legal utterences. Experience, however, has told us that the profoundest lawyers are not always the best administrators of the criminal law."

CHAPTER XI.

ADDRESS TO THE JURY.

In England the jury system prevails even in the trial of civil cases. In India trial by jury is available only in criminal cases before the High Courts and the Sessions Courts, as also in some other special class of cases. There are again some districts where sessions trial is held with the aid of assessors. The principal grounds for challenging a juror are to be found in s. 228 Cr. P. Code. Selecting a jury is a difficult and delicate task. They are the men who will decide the destiny of the prisoner at the bar. The advocate must be extremely courteous to them and before challenging any one of them, he must be sure of his ground and state his reasons frankly. Unfitness should not be presumed on insufficient grounds or on mere suspicion. If possible, it is better to have men of the same standing or position in life as the accused ; or men who can by reason of the liberality of their mind put themselves in the position of others, whatever their pursuit might be. A man of ordinary station will better understand the feelings of another equally placed in life. Men go with their prejudices to the jury box, and consciously or unconsciously they will be dominated by them. Men in the same profession will feel a natural sympathy towards each other. Men of one class are prejudiced against another class and they cannot get over their notions whether in the jury box or outside. If appeal is to be made to the finer feelings of men, one would like men of culture in preference to men of coarse feelings.

Before you determine what line of argument to adopt, you should try to ascertain the mental characteristics of the jury. This is not always an easy task. A jury consisting of matter of fact men are not likely to be moved by nice and well balanced arguments which may appeal to men of imagination and culture. They would rather like to hear of what they are accustomed to regard as natural and credible in their own experience. With a very low percentage of literate men in India, it is very difficult to get a satisfactory jury. Elliott says: "Jurors, for the most part are not wanting in intelligence, but they are not, as a general rule, persons of wide experience. Their lives are bounded by narrow limits, for they do not meet men in the great affairs of life. Nor are their minds trained and disciplined by habits of thought and study on many or great concerns, for, in general, their lives run along a level, and they think only of things that come before them in the ordinary affairs of life. In the contests of the forum new things are brought before their minds; acts, events, conduct and transactions take forms and shapes strange to them and foreign to their methods of thought. What is strange and new generally wears the guise of improbability, although not always, by any means, is this true. It is in making new things and things that assume strange forms correspond with things already in the minds of the jurors that skill in advocacy in a great part consists." (Work of the Advocate, p. 429).

"In arguing questions of fact to a jury the first thing which an advocate must consider is, what are the best arguments he can use, under all the circumstances. He should endeavour to put himself, in imagination, in the place of the jurors whom he addresses and think how

he would be affected by the arguments which he proposes to use, and then adapt his arguments as nearly as possible to each juror.

"He must be content to address the jurors as they are, and not as they ought to be, and, in order to be successful, the advocate should become acquainted, if possible, with the principles, sentiments, prejudices and beliefs of the jurors, as well as their various occupations. Every juror has his particular or peculiar (and some of these are *very* peculiar, indeed), views and prejudices, and the advocate who runs counter to them *will* most certainly lose his case. In order to ascertain the modes of thought of lay men, the advocate should converse, as often as opportunity will permit, with persons who ordinarily sit as jurors. Let him seek them in the street, on the farm, in the shop, in the factory, wherever they are to be found. Edmund Burke owed much of his success as a speaker to his habit.

"While an intelligent study of the jury after they take their seats in the box will give him a fair idea of their capacities and qualities, he must not be content with his preliminary survey, *but, he should watch, with the greatest care, the twelve men after the case has been fairly begun. Then he will discover who are wise, who are weak, who are shrewd, who are shallow, who are easily influenced, and who are the stubborn.* The advocate should make his observations while the witnesses are being examined, and while opposing counsel is addressing the jury or the Court. He will find that the men of understanding upon the jury will pay the very best attention to all that is said, while the weakest minded jurors will be gazing around the Court room, and paying very little, or no attention, to the proceedings. Then, too, he can see from

the expressions upon the faces of the jurors while something favorable to his side is being brought out on examination, whether they are biassed in his favour or prejudiced against him." (Hardwicke, pp. 278, 279).

It has been pointed out elsewhere more than once that in order to argue in a persuasive manner the advocate must have a thorough grasp of the facts (*ante* Ch. III). They are the materials with which he has to convince the jury. As they hear the evidence, the minds of the jurors rock to and fro and they are swayed by conflicting ideas—sometimes one set of facts and sometimes another predominates. It may be that in some cases the facts and circumstances are one sided that they feel no hesitation in coming to a conclusion one way or the other ; but in the majority of cases where numerous facts are let in, they desire to be told about the connection between them so that a rational hypothesis supported by probability may be built. If the process be left to the jurors themselves and the advocate does not help their understanding by putting the things in their true perspective, the disconnected facts will confuse them and obscure their ideas. The numerous facts which form the basis of conviction are scattered through the evidence and they must be subjected to a thorough analysis. The relevant and material facts should be separated from the irrelevant and immaterial facts, their probability or improbability should be shown, the strong points in favour of the accused should be eliminated, the weak points in the adversary's case made apparent, fallacies must be exposed, the credibility of the witnesses discussed and the whole thing must be put before the jury methodically and neatly with necessary explanations in as persuasive and forceful language as possible. The

materials at your disposal should be utilised with only one end in view, *viz.*, the creation of a conviction in favour of the cause undertaken. The cause may be good, but that does not necessarily mean that it would appear so to the jury. The facts which go to establish the case may not come to the surface at all or their force may not be evident, unless you pick out the important facts and connect them in a manner which presents a perfect picture of what you think to be the theory of your case. It is like preparing an image of what you have in your mind with clay. In presenting the facts it should be remembered that principal facts are often surrounded with or interpersed between minor facts, and the probabilities depend upon the creation of a perfect chain of facts by connecting them together.

The first thing necessary is to have a definite theory of the case. There can be no defence unless such a theory is framed. The theory must be evolved out of the facts brought to light in the evidence and the surrounding circumstances. Imagination, inference and experience play an important part in the construction of the theory. The test of a good theory is probability. Exceptional cases may require the formation of a bold theory, but in the majority of cases the theory must be such as is supported by strong probability. Given the same facts two men will construct two different theories and the one which is more probable and natural and is consistent with experience is bound to be accepted. Much depends on the theory of the case. The authors of the Works of the Advocate say: "The theory of the defence in the Webster case is an example of one lacking the virtue of probability. In that case the principal hypothesis, and

the one which really constituted the theory of the defence, was, that Dr. Parkman was killed after leaving the medical college, by persons unknown to the prosecutor or the defendant, and his body was carried into the rooms occupied by Webster, and there disposed of and concealed. This was in itself a highly improbable theory, and when applied to the facts developed by the evidence its improbability was greatly increased. The theory adopted by the prosecution was much more probable, and was simple and natural in its construction and development. That theory was that the deceased, between two known hours of a designated day, entered the lecture rooms of Professor Webster ; that there was an interview between the two men ; that Parkman never left the rooms alive ; that the parties never separated ; that Parkman was then and there slain, the remains disposed of by Webster, and by him kept concealed until their discovery the week after the murder." (Work of the Advocate p. 107). Rufus Choate, the great American advocate criticised the theory of the defence "and displayed a just conception of the true theory of the defence, and a keen perception of the weakness in the one adopted. His judgment was that the theory of the defence should not have been that the remains found in the furnace in Webster's laboratory were not those of Dr. Parkman, but that the theory should have been so constructed as to require the government to show whether Parkman came to his death by visitation of God, or whether the killing was the result of a sudden quarrel, or was done in self defence." (Work of the Advocate, p. 79). Another illustration may be given from the same book. "A man fell into an excavation in a public street made by parties licensed by the municipal

corporation. The theory adopted by counsel was that the corporation was liable for the negligence of its licensees ; but the theory was unsound and the plaintiff was defeated. The same facts were laid before other counsel ; they constructed a theory that the corporation was liable because it was chargeable with notice of the dangerous condition of the street and on this theory tried the case and secured a verdict." (Work of the Advocate, p. 78).

A fanciful theory is always fatal to a cause. The strength of a theory lies on the strong probability of the facts on which it is based. There can be no sound theory if there is one improbable fact in it. Lawyers have frequently to think upon their feet. A witness on whose statement you depended for your theory may give away in cross-examination, or facts for which you were not at all prepared are let in during the examination of other witnesses. This turn of events may make the theory you had already decided upon, improbable and unworkable. You will then have to throw yourself upon the resources of the moment and construct another theory within the shortest possible time, as you conduct the case. There may be alternative theories on the same facts, but inconsistent cases are fatal. The litigant who avails himself of the right to press inconsistent cases before the Court and endeavours to establish both the alternatives by contradictory oral testimony, plainly places himself in peril and may find himself entangled in inextricable difficulty, for evidence adduced in support of two absolutely inconsistent cases, which are mutually destructive can hardly be expected to secure confidence (*Bhubanmohini* v. *Kumudbala*, 28 C.W.N. 131).

A well constructed and definite theory must therefore have the virtue of probability. The object is to create a belief in the minds of the jurors and a theory which is against the probabilities or fantastic is always a bad one. It must be established by the evidence in the case and supported by law. Above all, the theory must be a clear one. Each fact must be given the prominence it deserves. Facts huddled together without order or arrangement is like an undisciplined army and the inevitable consequence would be the presentation of an obscure theory. In constructing the theory regard must be had to the presumptions of law and fact.

As to address, Adams says:—"To the bench his most powerful instrument of conviction is profound and accurate deductions. To the jury, his most effectual weapon is copious elucidation. His address to the Court should be concise without obscurity: to the jury, copious without confusion." The advocate should use as few technical terms or phrases as possible and if they are unavoidable he should explain them as clearly as possible. The suggestions and advice given in a previous chapter regarding address to the Court (v. Ch. VIII *ante* p. 180) should be recalled in this connection. It should be remembered however that the duty of explaining the law to the jury is on the Court and not the advocate. This duty is cast on the judge by statute (v. ss. 297, 298 Cr. P. Code).

Enough has been said elsewhere about the style of speech during an address (*ante* p. 8). Eloquence is a natural gift and one possessing it undoubtedly gets an advantage over the person who is not so fortunate. But it is possible for most men to acquire facility in speech

in the particular sphere of their work by study and practice. This is demonstrated in the lives of many famous advocates. Men who rose to the top of the profession, made a poor show when dealing with briefs in the early years of their struggle. The style of speech must be suited to the occasion. There is power in words, but words without ideas or arguments cannot create conviction. But the combination of eloquence and well reasoned argument supported by fact and law produces the greatest effect. What contributes most to success is not only the strength of the cause but the power to make it appear that is deserves the verdict of the jury. It is here that the skill of the advocate lies. The art of putting things is a consummate art. The marshalling of facts, the elimination of the strong points, the casting of the weak points into shade and giving the whole thing an air of probability, require no mean skill and experience. It requires so much tact that by artful handling the worse may be made to appear better. Conversely, a fact which tells against you may be made to look insignificant or explained away by a skilful putting of things. The jury cannot be persuaded by flattery, much less by mere speech. Jurors give verdict not because they are swayed by a great speech but because they think that the view which they take is right and conform to the test of probability. Vanity is inherent in man. Jurors will hardly admit that they are moved by a powerful speech ; and if they suspect that their intellectual capacity is underrated, they become sensitive and resent the inference. Rufus Choate's eloquence and skill in the construction of theories were unsurpassed. Speaking of him, Prof. Matthews said: "We were once talking with an intelli-

gent old gentleman in Massachusetts, a hard-headed bank president, who had served as foreman on a jury in a law case, about the ability of Rufus Choate. 'Mr. Choate,' said he, 'was one of the counsel in the case, and, knowing his skill in making white appear black and black appear white, I made up my mind at the outset that he should not fool me. He tried all his arts, but it was of no use. I just decided according to the law and evidence.' 'Of course, you gave your verdict against Mr. Choate's client?' 'Why, no, we gave a verdict for his client ; but then we could not help it—he had the law and the evidence on his side.' " (Work of the Advocate, p. 357).

To be impressive and convincing, a speech to the jury should be shorn of useless rhetoric or metaphor. Words should be spoken with force and sincerity but in the plainest possible language interspersed with homely illustrations drawn from every day life. There should not be anything of artificiality or borrowed eloquence in the speech. Not that juries do not appreciate eloquence and fine language. Eloquence has undoubtedly its use but it must be suited to the occasion. First choose the materials and settle the facts and then bring forth all the eloquence you can command. Hardwicke says: "The advocate should address the jury just as he would address a friend in the street upon a matter of business. When he meets a friend he talks to him familiarly and uses plain language and homely illustrations, and does not leave him unless he makes himself understood. This is the way in which Lord Abinger dealt with his juries, and was the chief reason he almost invariably defeated the brightest ornaments of the English bar who were more

eloquent and more learned than himself, but who did not have the faculty of communicating their knowledge in this way" (Hardwicke, p. 281). Clear away the mist and then impress your well-thought-out ideas forcibly and clearly. Place yourself in the position of the jury men and talk to them as if you are one among them. It is then that they will understand you most and fall in with your arguments. David Paul Brown speaking of a great verdict-getter says: "In addressing a jury he seemed to argue his case with them than to them, and in the language of one of his competitors, he virtually got into the jury-box and took part, as it were, in the decision of his own case.' " "The Duke of Wellington said of Lord Abinger, that when he pleaded a cause there were thirteen jury men". (Work of the Advocate, p. 358). There may be cases which require the expression of profound thought, but it is not at all difficult to make the jury men understand such thoughts when clothed in appropriate language. Rufus Choate says: "It is a great mistake to think anything too profound or rich for a popular audience. The train of thought is too deep or subtle or grand ; but the manner of presenting it to their untutored minds should be peculiar. It should be presented in anecdote, or sparkling truism, or telling illustration, or stinging epithet, always in some concrete form, never in a logical, abstract, syllogistic shape."

Do not try to deceive jury men by underrating their intellect. Most of them are hard matter-of-fact men and any attempt to hoodwink them will make you lose their sympathy. They will then suspect even the best part of your argument. Nor does flattery elate or move them. What is needed most and what succeeds most is to make

the jury men feel that you expect their verdict on your side because the view pressed is the right view possible. You manner must be extremely respectful and there should not be the slightest exhibition of temper or arrogance. If there is an indication of impatience or tendency in the jurymen to think contrarywise, you should not lose self-possession but make another attempt to explain the things which appear to them doubtful or obscure. Begin with modesty self-possession and sincerity and end in the same manner. How beautiful, modest and tactful is the following speech with Lord Erskine made in favour of Lord George Gordon:—

"Gentlemen, I feel entitled to expect both from you and the court the greatest indulgence and attention. I am indeed a greater object of your compassion than even my noble friend whom I am defending. He rests in conscious innocence and in well-placed confidence that it can suffer no strain in your hands. Not so with me. I stand before you a troubled, and, I am afraid, a guilty man, in having presumed to accept the aweful task which I am now called upon to perform—a task which my learned friend who spoke before me, though he has justly risen by extraordinary capacity and experience to the highest in his profession, has spoken of with distrust and diffidence which becomes every Christian in a cause of blood. If Mr. Kenyan has such feelings, what must be mine! Alas, gentlemen, who am I? A young man of little experience, unused to the bar of criminal counts, and sinking under the dreadful consciousness of my defects. I have, however, this consolation, that that no ignorance nor inattention on my part can possibly prevent you from seeing, under the direction of the judges, that the crown has established no case of treason."

When an advocate finds that the Judge or the jurymen have an inclination to go against his client and the case is a difficult one, he should acknowledge the force of

facts or circumstances against him and try to persuade them by gentle means instead of attacking the opponent's case severely and declaiming it in strong language. Lord Abinger knew how to face such a situation and this is how he tackled it. He writes in his autobiography: "Very often, when the impression of the jury, and sometimes of the judge, has been against me on the conclusion of the defendant's case, I have had the good fortune to bring them entirely to adopt my conclusions. Whenever I observed this impression, but thought myself entitled to the verdict, I made it a rule to treat the impression as very natural and reasonable, and to acknowledge that there were circumstances which presented great difficulties and doubts, to invite a candid and temperate investigation of all the important topics that belonged to the case, and to express rather a hope than a confident opinion that upon a deliberate and calm investigation I should be able to satisfy the Court and the jury that the plaintiff was entitled to the verdict. I then avoided all appearance of confidence, and endeavoured to place the reasoning on my part in the strongest and clearest view, and to weaken that of my adversary; to show that the facts for the plaintiff could lead naturally but to one conclusion, while those of the defendant might be accounted for on other hypothesis; and when I thought I had gained my point, I left it to the candour and good sense of the jury to draw their own conclusions. This seems to me not to be the result of any consummate art, but the plain and natural course which common sense would dictate."

Repetitions which are often unnecessary when addressing a judge may sometimes be necessary in the case of a jury. The advocate will often be compelled to

repeat his propositions or reasons to the jury, though it is better to do so under different forms in order to avoid tedium. Jurymen are not trained in the dissection and assimilation of facts and it is no knowing when their feeling turn from conviction to doubt and *vice versa*. Whenever a puzzled expression is visible upon their faces, it may be taken that they have not understood the advocate's point and he would do well to make a fresh attempt to explain matters. The advocate should always study their demeanour and watch and see whether the impression once created persists. Rufus Choate said: "I have been so often disappointed in the sudden turn which jurors' minds take, I have proved them false on such trivial points, that, as I grow older, I argue every point even at the risk of tedium."

No point is small or trifling in a criminal case. What may appear trifling to the advocate may sometimes carry immense weight with a jury or a particular type of jury, and so it is always safe to rely on all points, giving of course prominence to the strong points.

Sometimes an appeal to the consequences to which a verdict will lead may influence the jury. Sympathy is always a great lever. It may be possible to obtain a verdict against the law and evidence by pointing out the disastrous consequence of a verdict. But the attempt should, in appropriate cases. be made very cautiously and not directly. If the men in the jury box feel that the advocate thinks that he can play with their passions and that they are capable of giving consideration to the consequence of a verdict in preference to their conscience or duty, it would pique their vanity and make them stiff. Concession to weakness is a

thing which no man will own. The advocate should therefore approach the point in a round about way. He should carefully avoid saying point blank that the consequence should move them but mention it incidentally while impressing on them the points that entitle the accused to their verdict. An appeal to consequence may well be made in the case of unfortunate young women who are seduced and deserted by rouges and do away with their illegitimate offsprings to conceal their shame.

CHAPTER XII.

OF THE DUTIES OF A JUDGE.

It may not be out of place here to say a few words regarding the duties of a judge. The duties of a judge are very well stated in an erudite work which is now very difficult to obtain. "The process which a judge may use to construct a judgment, is the exercise of a variety of duties. A judge's general duties so exercised are: to gather the materials; as facts, law, and authorities, of which to form his judgment; to set on authorities their just value, and to take them as guides in the formation of his judgment; to hear the arguments of counsel; to contend with difficulties presented by the subject of the suit or by authorities, aided by his own knowledge and arguments, and the arguments of counsel, with a single and unbiassed mind to deliberate on his judgment; and in so doing to heed the nature of the case, as a case that is new, or that falls within some rule, or is concluded by precedent, or is distinguishable from precedent, or is a fit case to be adjudged on its own particular circumstances only; and, in most instances, to look forward to the consequences of the judgment contemplated." (Ram's Legal Judgment, 1871 ed. pp. 23, 24).

The following extracts from Ram's Legal Judgment (pp. 323—396) will illustrate some of the subjects referred to. It is desirable that advocates should know some thing about the duties of a judge and the multifarious difficulties which he has to contend with,

so that they might offer the judge their fullest possible help and co-operation in the discharge of his functions.

"Difficulty it is observable, is a chief occasion of most of the same duties: difficulty generally speaking, springing from want of information, from discordancy of authorities, or from incorrectness or discordancy of reports. Difficulty besides, often attends the interpretation of an instrument, and especially, of Wills.

"One source of difficulty may be, want of knowledge in the judge. It has been said—'No attorney is bound to know all the law. God forbid that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law' (*Montriou* v. *Jeffries*, 2 C. & P. 213).

"Another source of difficulty may be, error in judgment on the part of a judge; and when that occurs Lord Brougham says: 'No judge ought to be ashamed, after erring in judgment, to acknowledge his error. Still less has a court, any reason, for so unseemly a reluctance, to admit that the dispensers of justice are subject to the common lot of humanity'. (*Exparte, Cottle,* 14 Jurist, 655).

"Lord Hardwicke in *Walmsby* v. *Booth*, 2 Atk. 27, very nobly said,—'Upon this case being re-argued and reconsidered, I am thoroughly convinced that my former decree was wrong', and in another case, the same learned judge said,—'These are the reasons which incline to alter my opinion, and I am not ashamed of doing it, for I always thought it a much greater reproach to a judge to continue in his error than to retract it (2 Atk. 438).

Of certain facts illustrative of difficulty.

"Some idea of the frequency of difficulties, and of

the magnitude of many of them, may be gathered from the following facts:—

"1. Instances, in which a judge has entertained doubts on a question, are too common to bear enumeration. Lord Eldon had doubts upon a will for twenty years.

"2. A judge's opinion has been changed 'after mature consideration'; a change which is not infrequent.

"3. Very generally, authorities are conflicting. Sometimes two cases are 'in direct opposition to each other', 'directly contradictory'; and often many authorities are hardly, if at all reconcilable, or are in some degree, contradictory.

"4. Expressions of difficulty, caused by the state of authorities, or by some other circumstance, are frequent on the bench. These, or the like, expressions are of repeated occurence:—'The decisions run very near to each other, and are hardly reconcilable' (3 B. & Ad. 418): "I have had great difficulty. I confess that I cannot reconcile the opinion I have formed with all the authorities on the subject, which are to be found in the books; nor can I reconcile those authorities with one another' (1 Russ. 404).

"5. A common wish of a judge is, that a case be decided in the House of Lords. In the case of a will, and in which he affirmed a decree of Lord Rosslyn, Lord Eldon concluded his judgment by saying,—'Upon the whole, it is better for me to affirm the decree; not, as being satisfied with the principle of it, but, as I cannot make a decree, with which I should be better satisfied. That will put it into the course to go to the House of

Lords ; where the opinion of the twelve Judges may be taken upon the construction of the will'. (11 Ves. 667).

[Lord Dunedin has said: "Law Lords have no business to have doubt in law. We may be wrong, but it will be known only on the last day of judgment."]

"6. Different judgments or opinions delivered in the same cause by judges of the same court, or of different courts, or in the same cause by different courts, and the frequency of these opposing judgments, or opinions, are conclusive proof of great difficulty, with which the judges have often to contend in constructing their judgments.

Of learning the whole truth of a case referred to.

"A report of a case very frequently presents some difficulty, when there is reason to doubt, whether the Court adjudged on the ground stated in the report (Ambl. 55, 56) ; or it is impossible to say, on what ground the Court did proceed (Ibid 1 C. & M. 266). It clearly also presents a difficulty, when it enables a judge to speak of its inaccuracy, falsity, or other vice, in these, or like terms:—'The printed judgment must be erroneous' (5 Ves. 85): 'The book there is nonsense' (1 Lord Raym. 522): 'This must be a very incorrect report ; it is impossible that it can be a true representation of what Lord Chief Justice Holt said' (1 Burr. 458, 459).

Of hearing arguments of counsel.

"There is a case in which Sir R. P. Arden, when the cause was opened, expressed an opinion, but nevertheless suffered counsel to proceed in their argument. After which that learned judge observed,—"I am not sorry, though my first impressions upon this point are not removed, and though the time it has taken can now be very ill spared, that this cause has been heard through-

out ; for when gentlemen of eminence at the bar resist the first impressions of the Court, it is my duty, however satisfied I may feel myself, not to decide, till I hear what can be said" (*Binford* v. *Dommett*, 4 Ves. 756, 758, 761).

"Mr. Somers, afterwards the great Lord Chancellor, when a very young man, rising after five or six seniors, said,—'That he was of the same side, but that so much had been already said, he had no room to add anything, and therefore he would not take up his Lordship's time by repeating what had been so well urged by the gentlemen who went before him.' 'Sir', said Lord Nottingham, 'pray go on. I sit in this place to hear every body. You never repeat, nor will you take up my time ; and therefore I shall listen to you with pleasure.'

"It is one of the duties of a judge 'to render it disagreeable to counsel to talk nonsense' [VI Champbell's Lives Chanc., II, said to be a *dictum* of Lord Lyndhurst. Lord Campbell adds in a note that he made the statement before he was a judge, that after having been a judge, he adhered to the sentiment.]

"The Courts have—it appears a discretionary power with regard to a second argument of a case.

"Several cases occur, wherein a second argument has taken place, or been allowed. It was allowed in *Booth* v. *Hodgson* (6 Durn & E. 408), where Lord Kenyon observed,—"It is the great duty of every court of justice to administer justice as well as they can between the litigating parties ; another and not less material, duty is, to satisfy those parties that the whole case has been examined and considered : and it was with a view to the

latter of these, to the pressing instance of plaintiffs' counsel, and not on account of any doubt on the subject, that this case stood for a second argument."

"Some cases have been argued three times and even four.

"The utility and importance of counsel's argument are proved, if proof be needed, by the power which it has, sometimes to stagger, or to cause to fluctuate, and sometimes to convince the mind of the Court. Buller, J., begins his judgment in a cause, which had been twice argued, by observing,—'This case has been very fully, very elaborately, and very ably argued, both now and in the last term; and though the former arguments on the part of the defendant did not convince my mind, yet they staggered me so much that I wished to hear a second argument' (2 Durn. & E. 72). So in another case, Abbott, C. J., says,—"This case has been most fully and satisfactorily discussed, and the opinion I had originally formed has been changed in the course of the argument.' And Bayley, J., stated,—'I entertained at first great doubts in this case, which the discussion it has undergone has, however, entirely removed' (2 Barn. & Ald. 153, 155).

Of obtaining the opinion of another judge, or Court.

"A Court of law sometimes obtains the opinion of all the judges of the other law courts, on a question which it has to decide.

"In a comparatively modern cause, *Smith* v. *Richardson*, which came up before the Court of Common Pleas on a case made at the assizes, and reserved for the opinion of the Court, 'this being a new case and a case

of great consequence, the Court thought proper to desire the opinion of the rest of the judges, not only to guide their own judgment, but that there might be a uniformity of opinion for the future in a matter of so great moment.'

"The opinion of a Court of law it is sometimes proper to require, when the question is a new case, a new point, or a question on which there is no decision, or not one case already in point determined, a question that is one of great nicety, or in which the opinion of one judge is one way, and that of another judge the other.

"The question so proposed to a court of law must, it seems to be considered, be a legal, as distinguished from an equitable question.

[*Cf.* The provision relating to reference to Full Bench or Special Bench for opinion and the provision in Or. XLVI C. P. Code for reference to the High Court of a doubtful question of law.]

Of bias.

"There is on kind of bias, which the Courts possess, and suffer to incline them in forming the judgments they give. It is a bias favourable to a class of cases, or of persons, as distinguished from an individual case or person. A bias which on some subjects sways them is convenience.

"A constant wish of the Courts is, to favor an heir at law (1 W. Bl. 256) ; as where there is 'an heir on the one side and a mere volunteer on the other' (Willes, 570) : They possess a strong reluctance to disinherit an heir at law (Ambl. 645) : 'Courts always lean in favour of an heir at law capriciously disinherited' (By Lord Manners, 1 Ball & B. 309). 'It is not to be controverted' says Lord Hardwicke, 'but that the favour of Courts to heirs at law,

I mean judicial favour, has prevailed in some instances' (3 Atk. 806).

"There is a strong disposition in the Court of Chancery, to construe a residuary clause in a will, so as to prevent an intestacy with regard to any part of the testator's property (2 Meriv. 386).

"It was said by Lord Hobart,—'I commend the judge who seems fine and ingenious, so it tend to right and equity; and I condemn them who either out of pleasure to show a subtle wit will destroy, or out of incuriousness or negligence will not labor, to support the act of the party by the art or act of the law'.

"In a hard case, it may sometimes be impossible for the Court not to feel for the individual obliged to endure that hardship (15 East 604, 605). But it is certain the courts do not permit the mere fact of hardship in a case to outweigh the law of it (Willes, 98, Cowp. 191, 192 &c.). Relative to hardship the Bench uses these or the like expressions: "This may be case of individual hardship, but the court is bound to proceed upon those principles, which are deemed essential to the general interests of mankind (4 Madd. 418).

"The courts have not one rule for one individual, and a different rule for another, or one for the rich and another for the poor (*The King* v. *Lord Cochrane*, 3 M. & S. 10). 'The case of this illustrious person (Comte d' Artois, afterward Charles X of France) must be decided on the same grounds, that would operate in favour of the meanest individual' (Lord Eldon, *Sinclair* v. *Charles Phillipe*, 2 B. & P. 363).

"It has frequently happened that one of several judges, of whom a Court was composed, has declined to

give his opinion in a case before the Court. He has declined to give it 'for private reasons' (4 Barn. & Adol. 29), or 'being connected with the parties' (5 M. & S. 21); or being connected with one of the parties' (5 D. & E. 5); or having, when at the bar, been 'counsel in the case,' 'been consulted', 'concerned', or 'engaged' in it.

Of postponing delivery of judgment.

"Where the court has no doubt, it may often be its duty to give judgment immediately after the argument of a case. Burrow, in his report of a cause, subjoins to the argument there:—'As this was the first argument, it was expected (as of course) that it would be argued again; but Lord Mansfield gave his opinion immediately, to the following effect: Lord Mansfield,—'Where we have no doubt, we ought not to put the parties to the delay and expense of a further argument; nor leave other persons, who may be interested in the determination of a point so general, unnecessarily under the anxiety of suspense' (1 Burr. 5).

"Often a case is ordered to stand over, to search for precedents; or 'to look into the cases'; or into a particular case, or cases, cited; and sometimes for the purpose of a further argument. At other times the Court delays to pronounce judgment, because a similar case is depending in another Court, and the judgment is deferred until the decision of that case. And, under a circumstance of this kind, a judgment has been postponed, to confer with the judges of the other Court.

"A case may be mentioned, where, after the argument was closed, the Court gave their opinions upon some of the points urged at the bar, and on other points took

time to consider of their judgment (*The King* v. *Croft*, 3 B. & Ald. 171).

"On one occasion, after the rest of the Court had delivered their judgments, Grose, J., desired to have further time to consider of his opinion (2 Durn. & E. 371).

"It is an observation of Sir T. Clarke,—'There are two things, against which a judge ought to guard,—precipitancy and procrastination. Sir Nicholas Bacon was made to say, which I hope never again to hear, that a speedy injustice is as good as justice which is slow' (1 Dick. 377).

" 'It was his (Judge Story's) habit, after hearing an argument in any case of importance, to defer the investigation of the matter, until his mind had cooled after the excitement of the hearing, and freed itself of all bias produced by the high colorings of the advocate, and eloquence of his appeals ; leaving in his memory only the impressions made by the principal facts and the legal reasonings ; of which also he took full notes—after this, he carefully examined all the cases cited and others bearing on the subject, reviewing and fixing firmly in his mind all the principles of law which might govern the case. By the aid of these principles, he proceeded to examine the question on its merits, and to decide accordingly, always first establishing the law in his mind, lest the hardship of the case should lead him to an illegal conclusion' (Story's life and letters, 583). This practice was the reverse of that attributed to Ch. J. Pendleton, who first decided in his own mind which party ought to succeed, and then proceeded to look up authorities in support of their conclusion.

" 'The faults of Lord Eldon's judicial style', says Lord Campbell, 'are very much ascribed to the circumstance, that in delivering his opinions he always extemporised, not even making use of notes. If the advice of an individual so humble as myself could have any weight hereafter, I would most earnestly implore judges in all cases of importance to prepare written judgments. The habit not only insures minute attention to all the facts of the case, and a calm consideration of the questions of law which they raise, but is of infinite advantage in laying down rules with just precision, and it has a strong tendency to confer the faculty of lucid arrangement and of correct composition. How inferior would Lord Stowell's judgments have been, if blurted out on the conclusion of the arguments at the bar, and taken down by a reporter!'

"The cause, or perhaps the pretext for Lord Eldon's delays, was a principle on which he professed to act, that it was always his duty to read the bill, answer, deposition, and exhibits, and to consider not only the facts stated and the points made at the bar, but all the facts in the cause, and all the points that might be made on either side. I know, said he, it has been an opinion—a maxim—a principle—ay, an honest principle, on which several of those who have presided in this Court have acted, that a judge is obliged to know nothing more than counsel think proper to communicate to him, relative to the case. But for myself, I have thought and acted otherwise, and I know, yes, I could swear upon my oath, that if I had given judgment on such information and statements only as I have received from counsel on

both sides, I should have disposed of numerous estates to persons who had no more title to them than I have; and believe me that I feel a comfort in that thought, a comfort of which all the observations on my conduct can never rob me (X Campbell's Life of the Chanc. ch. ccxiii, p. 229).

"It is the duty of a judge, in grave and difficult cases, to take time to consider; but it is his duty, as soon as is consistent with due deliberation, to make up his mind and to deliver judgment; further delay not only unnecessarily prolonging the suspense of the parties interested, but rendering the judge less and less qualified to decide rightly, as the facts of the case escape from his recollection, and the impression made upon him by the arguments at the bar is effaced, to say nothing of the double time and labor required from him in vainly trying to make himself master, a second time, of what he once thoroughly understood" (X Lives of the Chanc. ch. ccxiii, p. 226).

Of looking forward to the consequences of a judgment.

"A particular suit often involves the determination of a general point; in this point persons, who are not parties to the suit, are interested; and the Courts' decision may produce general or public inconvenience. In such cases, therefore, a duty of a court is, to look forward to the consequences, which may result from its decision (7 Taunt. 496). In a cause in the House of Lords, Lord Eldon observed,—"It is not sufficient to consider merely the rights of those, who are immediately interested in this case..... We are bound to look at this case, with a view to its effect upon the interests of all other persons" (1 Dowl. & Cl. 297).

It may lastly be said that inspite of his utmost vigilence and honesty, a judge is sometimes powerless to prevent wrong. Bishop Sanderson said: "For say a judge be never so honestly minded, never so zealous of the truth, never so careful to do the right, yet if there be a spiteful accuser that will suggest anything, or an audacious witness that will swear anything, or a crafty pleader that will maintain anything, or a tame jury that will swallow anything, the judge who is tied (as it is meet he should) to proceed *secundum allegata et probata,* cannot with his best care and wisdom, prevent it but that sometimes justice shall be perverted, innocency oppressed, and guilty ones justified" (Bishop Sanderson's Sermons, Vol. II, p. 103, ed. 1681 quoted in Ram on Facts, p. 316).

BACON ON DUTIES OF A JUDGE.

Lord Bacon's *Essay on Judicature* deserves to be read most carefully and constantly by every recepient of judicial honour. In it will be found a lofty conception of the duties of a judge. A portion of the essay is of equal interest to both judge and lawyer and it is reproduced here:

"Secondly, for the advocates and counsel that plead. Patience and gravity of hearing is an essential part of justice, and an overspeaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent. The parts of a judge in hearing are four: to direct the evidence, to moderate length, repetition, or

impertinency of speech, to recapitulate, select, and collate the material points of that which hath been said; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory, and willingness to speak, or of impatience to hear, or of shortness of memory, or of want of a staid and equal attention. It is a strange thing to see that the boldness of advocates should prevail with judges; whereas they should imitate God, in whose seat they sit, who represseth the presumptuous, and giveth grace to the modest; but it is more strange, that judges should have noted favourites, which cannot but cause multiplication of fees, and suspicion of by-ways. There is due from the judge to the advocate some commendation and gracing, where causes are well handled and fair pleaded, especially towards the side which obtaineth not;[1] for that upholds in the client the reputation of his counsel, and beats down in him the conceit[2] of his cause. There is likewise due to the public a civil reprehension of advocates, where there appeareth cunning counsel, gross neglect, slight information, indiscreet pressing, or an overbold defence; and let not the counsel at the bar chop[3] with the judge, nor wind himself into the handling of the cause anew after the judge hath declared his sentence; but, on the other side, let not the judge meet the cause half way, nor give occasion to the party to say, his counsel or proof were not heard."

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1 Is not successful.

2 Makes him to feel less confident of the goodness of his cause.

3 Altercate, or bandy words with the judge.

In the following extract from Lord Bacon's speech upon the occasion of Mr. Justice Hutton taking his oath of office as a Justice of the Common Pleas, will be found a most excellent summary of the duties of a judge,—

"To represent unto you the lines and protratitures of a good judge:

The first is, that you should draw your learning out of your books, not out of your brain.

2. That you should mix well the freedom of your own opinion with the reverence of the opinion of your fellows.

3. That you should continue the studying of your books, and not to spend on upon the old stock.

4. That you should fear no man's face, and yet not turn stoutness into bravery.

5. That you should be truly impartial, and not so as men may see affection through fine carriage.

6. That you should be a light to jurors to open their eyes, but not a guide to lead them by the noses.

7. That you affect not the opinion of pregnancy and expedition by an impatient and catching hearing of the counsellors at the bar.

8. That your speech be with gravity, as one of the sages of the law; and not talkative, nor with impertinent flying out to show learning.

9. That your hands, and the hands of your hands, I mean those about you, be clean and uncorrupt from gifts, from meddling in titles, and from serving of turns, be they of great ones or small ones.

10. That you contain the jurisdiction of the Court within the ancient merestones, without removing the mark.

11. Lastly, that you carry such a hand over your ministers and clerks, as that they may rather be in awe of you, than presume upon you."

CHAPTER XIII.

ADVICE TO YOUNG LAWYERS.

The profession of the law has been condemned by many. There are also innumerable persons who have spoken of the nobility of the profession. There are opinions both ways. Dr. Arnold said that: "it tends to moral perversion, involving as it does, the indiscriminate defence of right and wrong, and in many cases the knowing suppression of truth." But it may be said that the duty of an advocate is not to assume the functions of a judge and to decide what is true or untrue, but to believe what his client says and to put his case before the Court with all legitimate arguments in its favour. A man is presumed to be innocent till his guilt is fully established in a Court of law and every man accused of an offence, however serious, has a constitutional right to a trial according to law. Even if he is caught red-handed and every bit of evidence is against him, he is entitled to the fullest advantage of any defect or insufficiency in the forms of the proceeding, for everything must be done according to law. An advocate may defend such a man and use all legitimitate arguments that may be made in his favour without doing the least violence to his moral sense or infringing any code of ethics. Of course, if moral sense or sense of honour is cast away and one allows himself to be employed for baser ends or adopts dishonest practices, it is not the fault of the profession. As Lord Bolingbroke spoke of the legal profession: "In its nature

the noblest and most beneficial to mankind, and in its abuse the most sordid and pernicious." Lecky in his "Map of Life" said: "The difference between an unscrupulous advocate and an advocate who is governed by a high sense of honour and morality, is very manifest; but at least there must be many things in the profession from which a very sensitive conscience would recoil, and things must be said or done, which can hardly be justified, except on the ground that the existence of this profession, and the prescribed methods of its action, are in the long run indispensable to the honest administration of justice." Jonathan Swift's description of the lawyers as a "society of men bred from their youth, in the art of proving by words, multiplied for the purpose, that white is black and black is white, according as they are paid" shows only the black side of the picture.

Even in these days there is a considerable body of opinion against the profession and the whole profession is stigmatised as dishonest and immoral, because there are lawyers who have not the slightest scruple in resorting to any and every questionable practice for the sole end of earning money. As Walsh says: "It puts the lawyer in a class by himself. It overlooks the black sheep which every profession includes within its fold. Clergy may be unfrocked, doctors may commit unspeakable crimes for high fees, politicians may accept bribes, commercial men and high financiers may defraud the revenue, and rob the public. But no one condemns wholesale any one of these professions for the sins of their erring members, or demands their ostracism on the ground that their principles are immoral" (Walsh's Advocate, p. 20).

Inspite of the adverse criticism to which the profession

has been subjected from time to time, it has existed from very ancient times and will continue to exist so long as the world lasts. While the idea that there is something very vicious in the profession itself and every one adopting it is bound to become immoral or dishonest if he desires any measure of success, is of course unworthy of consideration ; it can not be denied that there is a possibility of the moral sense of many persons being corrupted if they do not keep away from early temptations and do not formulate some rules for the regulation of their conduct. The profession affords immense possibilities of doing good to many and achieving what is noble and high. Walsh says: "No doubt questions of extreme nicety and delicacy constantly arise in the daily practice of the advocate, when the dividing line between his duty to the client, and his duty to the Court, or, if you like to put it so, his own conscience, is a fine one. But the honest and fearless advocate will have no difficulty in deciding on which side his duty lies, if he keeps steadily in view the ordinary principles which ought to regulate the conduct of a gentleman." (Walsh's Advocate, pp. 18, 19). A study of the lives of great and noble advocates cannot fail to inspire the young entrant with lofty ideals. What must be cherished with care and strengthened is the moral sense which every man is endowed with in a greater or lesser degree. As Hardwicke says: "He must have the courage to become the patron of innocency, the upholder of right, the scourge of oppression and the terror of deceit."

Hoffman who was a very honourable and profound lawyer and who prized morality and honour above everything in an advocate, laid down some elaborate rules for

the regulation of his conduct in the shape of fifty resolutions. They touch upon almost every aspect of professional ethics and etiquette. These rules are of inestimable value and deserve careful perusal by every lawyer. They are reproduced below:—

FIFTY RESOLUTIONS

IN REGARD TO

PROFESSIONAL DEPORTMENT

BY ADHERENCE TO WHICH THE LAWYER MAY REASONABLY HOPE TO ATTAIN EMINENCE IN HIS PROFESSION.

From Hoffman's Course of Legal Study.

I. I will never permit professional zeal to carry me beyond the limits of sobriety and decorum, but bear in mind, with Sir Edward Coke, that "if a river swell beyond its banks, it loseth its own channel."

II. I will espouse no man's cause out of envy, hatred, or malice, towards his antagonist.

III. To all judges, when in Court, I will ever be respectful; they are the Law's vicegerents; and whatever may be their character and deportment, the individual should be lost in the majesty of the office.

IV. Should judges, while on the bench, forget that, as an officer of their court, I have rights and treat me even with disrespect, I shall value myself too highly to deal with them in like manner. A firm and temperate remonstrance is all that I will ever allow myself.

V. In all intercourse with my professional brethren, I will be always courteous. No man's passions shall intimidate me from asserting fully my own or my clients rights ; and no man's ignorance or folly shall induce me to take any advantage of him ; I shall deal with them all as honourable men, ministering at our common altar. But an act of unequivocal meanness or dishonesty, though it shall wholly sever any personal relation that may subsist between us, shall produce no change in my deportment when brought in professional connection with them ; my client's rights and not my own feelings are then alone to be consulted.

VI. To the various officers of the Court I will be studiously respectful ; and specially regardful of their rights and privileges.

VII. As a general rule, I will not allow myself to be engaged in a cause to the exclusion of, or even in participation with, the counsel previously engaged, unless at his own special instance, in union with his client's wishes ; and it must, indeed, be a strong case of gross neglect or of fatal inability in the counsel, that shall induce me to take the cause to myself.

VIII. If I have ever had any connection with a cause, I will never permit myself (when that connection is from any reason severed) to be engaged on the side of my former antagonist. Nor shall any change in the *formal aspect* of the cause induce me to regard it as a ground of exception. It is a poor apology for being found on the opposite side, that the present is but the *ghost* of the former cause.

IX. Any promise or pledge made by me to the adverse counsel shall be strictly adhered to by me: Nor

shall the subsequent instructions of my client induce me to depart from it, unless I am well satisfied it was made in error; or that the rights of my client would be materially impaired by its performance.

X. Should my client be disposed to insist on captious requisitions, or frivolous or vexatious defenses, they shall be neither enforced nor countenanced by me. And if still adhered to by him from a hope of pressing the other party into an unjust compromise, or with any other motive, he shall have the option to select other counsel.

XI. If after duly examining a case, I am persuaded that my client's claim or defense (as the case may be) cannot, or rather ought not to be sustained, I will promptly advise him to abandon it. To press it further in such a case, with the hope of gleaning some advantage by an extorted compromise, would be lending myself to a dishonourable use of legal means, in order to gain a *portion* of that the *whole* of which I have reason to believe would be denied to him both by law and justice.

XII. I will never plead the Statute of Limitations, when based on the mere *efflux of time*; for if my client is conscious he owes the debt, and has no other defense than the *legal bar*, he shall never make me a partner in his knavery.

XIII. I will never plead or otherwise avail of the bar of *Infancy*, against an honest demand. If my client possesses the ability to pay, and has no other legal or moral defense than that it was contracted by him when under the age of twenty-one years, he must seek for other counsel to sustain him in such a defense. And although in this, as well as in that of limitation, the *law* has given the defense and contemplates in the one case to induce

claimants to a timely prosecution of their rights, and in the other, designs to protect a class of persons, who by reason of tender age are peculiarly liable to be imposed on,—yet in both cases, *I shall claim to be the sole judge* (the pleas not being compulsory) of the occasions proper for their use.

XIV. My clients conscience, and my own, are distinct entities: and though my vocation may sometimes justify my maintaining as facts, or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In *civil* cases, if I am satisfied from the evidence, that the *fact* is against my client, he must excuse me if I do not see as he does, and do not press it: and should the *principle* also be wholly at variance with sound law, it would be dishonourable folly in me to endeavour to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day.

XV. When employed to defend those charged with crimes of the deepest dye, and evidence against them, whether legal, or moral, be such as to leave no just doubt of their guilt, I shall not hold myself privileged, much less obliged, to use my endeavours to arrest or to impede the course of justice, by special resorts to ingenuity—to the artifices of eloquence—to appeals to the morbid and fleeting sympathies of weak juries, or of temporising courts—to my personal weight of character—nor finally to any of the overweening influences I may possess, from popular manners, eminent talents, exalted learning, etc. Persons of atrocious character, who have violated the laws of God and man, are entitled to no such

special exertions from any member of our pure and honourable profession; and indeed to no intervention beyond securing to them a fair and dispassionate investigation of the *facts* of their cause, and the due application of the law: all that goes beyond this either in manner or substance, is unprofessional and proceeds, either from a mistaken view of the relation of client and counsel, or from some unworthy and selfish motive, which sets a higher value on professional display and success than on truth and justice, and the substantial interests of the community.

Such an inordinate ambition, I shall ever regard as a most dangerous perversion of talents, and a shameful abuse of an exalted station. The parricide, the gratuitous murderer, or other perpetrator of like revolting crimes, has surely no such claim on the commanding talents of a profession whose object and pride should be the suppression of all vice, by the vindication and enforcement of the laws. Those, therefore, who wrest their proud knowledge from its legitimate purposes, to pollute the streams of justice, and to screen such foul offenders from merited penalties, should be regarded by all (and certainly shall be by me) as ministers at a holy altar, full of high pretension, and apparent sanctity, but inwardly base, unworthy, and hypocritical—dangerous in the precise ratio of their commanding talents and exalted learning.

XVI. Whatever personal influence I may be so fortunate as to possess shall be used by me only as the most valuable of my possessions, and not be cheapened or rendered questionable by a too frequent appeal to its influence. Their is nothing more fatal to *Weight of*

Character than its common use; and especially that unworthy one, often indulged in by eminent counsel, of solemn assurances to eke out a sickly and doubtful cause. If the case be a good one, it needs no such appliance; and if bad, the artifice ought to be too shallow to mislead any one. Whether one or the other, such personal pledges should be *very sparingly* used, and only on occasions which obviously demand them; for if more liberally resorted to, they beget doubts where none may have existed, or strengthen those which before were only feebly felt.

XVII. Should I attain that eminent standing at the bar which gives *authority* to my opinions, I shall endeavour, in my intercourse with my junior brethren, to avoid the least display of it to their prejudice. I will strive never to forget the days of my youth, when I too was feeble in the law, and without standing. I will remember my then ambitions aspirations (though timid and modest) nearly blighted by the inconsiderate or rude and arrogant deportment of some of my seniors; and I will further remember that the vital spark of my early ambition might have been wholly extinguished, and my hopes been forever ruined, had not my own resolutions, and a few generous acts of some others of my seniors; raised me from my depression. To my juniors, therefore. I shall ever be kind, and encouraging; and never too proud to recognise distinctly that on many occasions it is quite probable their knowledge may be more accurate than my own, and that they, with their limited reading and experience, have seen the matter more soundly than I, with my much reading and long experience.

XVIII. To my clients I will be faithful; and in

their causes zealous and industrious. Those who can afford to compensate me, *must do so*; but I shall never close my ear or heart because my clients means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services cheerfully given.

XIX. Should my client be disposed to compromise, or to settle his claim, or defense; and especially if he be content with a verdict, or judgment, that has been rendered; or, having no opinion of his own, relies with confidence on mine, I will in all such cases greatly respect his wishes and real interests. The further prosecution therefore of the claim, or defense (as the case may be), will be recommended by me only when, after mature deliberation, I am satisfied that the chances are decidedly in his favour; and I will never forget that the pride of professional opinion on my part, or the spirit of submission, or of controversy (as the case may be), on that of my client, may easily mislead the judgment of both, and cannot justify me in sanctioning, and certainty not in recommending, the further prosecution of what *ought* to be regarded as a hopeless cause. *To keep up the ball* (as the phrase goes) at my client's expense, and to my own profit, must be dishonourable; and however willing my client may be to pursue a phantom, and to rely implicitly on my opinion, I will terminate the controversy as conscientiously for him as I would were the cause my own.

XX. Should I not understood my client's cause, after due means to comprehend it, I will retain it no longer, but honestly confess it, and advise him to consult others,

whose knowledge of the particular case may probably be better than my own.

XXI. The wealthy and the powerful shall have no privilege against my client that does not equally appertain to others. None shall be so great as to rise, even for a moment, above the just requisitions of the law.

XXII. When my client's *reputation* is involved in the controversy it shall be, if possible, judicially passed on. Such cases do not admit of compromise; and no man's elevated standing shall induce me to consent to such a mode of settling the matter: the *amende* from the great and wealthy to the ignoble and poor should be free, full and open.

XXIII. In all small cases in which I may be engaged I will as conscientiously discharge my duty as in those of magnitude; always recollecting that "small" and "large" are to clients relative terms, the former being to a poor man what the latter is to a rich one, and, as a young practitioner, not forgetting that large ones, which we have not, will never come, if the small ones, which we have are neglected.

XXIV. I will never be tempted by any pecuniary advantage, however great, nor be persuaded by any appeal to my feelings, however strong, to purchase, in whole or in part, my client's cause. Should his wants be pressing, it will be an act of humanity to relieve them myself, if I am able, and if not, them to induce others to do so. But in no case will I permit either my benevolence or avarice, his wants or his ignorance, to seduce me into any participation of his *pending* claim or defense. Cases may arise in which it would be mutually advantageous thus to bargain, but the experiment is too dangerous, and

my rule too sacred to admit of any exception, persuaded as I am that the relation of client and counsel, to be preserved in absolute purity, must admit of no such privilege, however guarded it may be by circumstances; and should the special case alluded to arise, better would it be that my client should suffer, and I loose a great and honest advantage, than that any discretion should exist in a matter so extremely liable to abuse, and so dangerous in precedent.

And though I have thus strongly worded my resolution, I do not thereby mean to repudiate, as wholly inadmissible, the taking of *contingent fees*,—on the contrary, they are sometimes perfectly proper, and are called for by public policy, no less than by humanity. The distinction is very clear. A claim or defense may be perfectly good in law, and in justice, and yet the expenses of litigation would be much beyond the means of the claimant or defendant—and equally so as to counsel, who, if not thus contingently compensated in the ratio of the risk, might not be compensated at all. A contingent fee looks to professional compensation only on the final result of the matter in favour of the client. None other is offered, or is attainable. The claim or defense never can be made without such an arrangement; it is voluntarily tendered, and necessarily accepted or rejected, *before* the institution of any proceedings.

It flows not from the influence of counsel over client, both parties have the option to be off; no expenses have been incurred; no moneys have been paid by the counsel to the client; the relation of borrower and lender, of vendor and vendee, does not subsist between them,—but it is an independent contract for the services of counsel,

to be rendered for the contingent avails of the matters to be litigated. Were this denied to the poor man, he could neither prosecute, nor be defended. All of this differs essentially from the object of my resolution, which is against *purchasing,* in whole or in part, my client's rights, after the relation of client and counsel, in respect to it, has been fully established—after the strength of his case has become known to me—after his total pecuniary inability is equally known—after expenses have been incured which he is unable to meet—after he stands to me in relation of debtor—and after he desires *money from me* in exchange for his pending rights. With this explanation, I, renew my resolution never *so to purchase* my *client's* cause, in whole or in part; but still reserve to myself, on proper occasions, and with proper guards, the professional privilege (denied by no law among us) of agreeing to receive a contingent compensation *freely offered* for services *wholly to be* rendered, and when it is *the only* means by which the matter can either be prosecuted or defended. Under all other circumstances, I shall regard contingent fees as obnoxious to the present resolution.

XXV. I will retain no client's funds beyond the period in which I can with safety and ease put him in possession of them.

XXVI. I will on no occasion blend with my own my client's money. If kept *distinctly as his,* it will be less liable to be considered *as my own.*

XXVII. I will charge for my services what my judgment and conscience inform me is my due, and nothing more. If that be withheld, it will be no fit matter for *arbitration,* for no one but myself can adequately

judge of such services, and after they are successfully rendered, they are apt to be ungratefully forgotten. I will then receive what the client offers, or the laws of the country may award,—but in either case, he must never hope to be again my client.

XXVIII. As a general rule, I will carefully avoid what is called *"taking of half fees."* And though no one can be so competent as myself to judge what may be a just compensation for my services, yet, when the *quiddam honorarium* has been established by usage or law, I shall regard as eminently dishonourable all *under bidding* of my professional brethren. On such a subject, however, no inflexible rule can be given to myself, except to be invariably guided by a lively recollection that I belong to an honourable profession.

XXIX. Having received a retainer for contemplated services, which circumstances have prevented me from rendering, I shall hold myself bound to refund the same, as having been paid to me on a consideration which has failed; and, as such, subject to restitution on every principle of law, and of good morals,—and this shall be repaid not merely at the instance of my client but *ex mero motu.*

XXX. After a cause is finally disposed of, and all relation of client and counsel seems to be forever closed, I will not forget that it once existed; and will not be inattentive to his just requests that all of his papers may be carefully arranged by me, and handed over o him. The execution of such demands, though sometimes troublesome, and inopportunely or too urgently made, still remains a part of my professional duty, for which I shall consider myself already compensated.

XXX. All opinions for clients, verbal or written, shall be *my opinions*, deliberately and sincerely given, and never *venal and flattering offerings to their wishes or their vanity*. And though clients sometimes have the folly to be better pleased with having their views confirmed by an erroneous opinion than their wishes or hopes thwarted by a sound one, yet such assentation is dishonest and unprofessional. Counsel, in giving opinions, whether they perceive this weakness in their clients or not, should act as *judges*, responsible to God and man, as also especially to their employers, to advise them soberly, discreetly, and honestly to the best of their ability, though the certain consequence be the loss of large prospective gains.

XXXII. If my client consents to endeavours for a compromise of his claim or defense, and for that purpose I am to commune with the opposing counsel or others, I will never permit myself to enter upon a system of tactics, to ascertain who shall overreach the other by the most nicely balanced artifices of disingenuousness, by mystery, silence, obscurity, suspicion, vigilance to the letter, and all other machinery used by this class of tacticians to the vulgar surprise of clients, and the admiration of a few ill-judging lawyers. On the contrary, my resolution in such a case is, to examine with care, previously to the interview, the matter of compromise ; to form a judgment as to what I will offer or accept ; and promptly, frankly, and firmly to communicate my views to the adverse counsel. In so doing no light shall be withheld that may terminate the matter as speedily and as nearly in accordance with the rights of my clients as possible ; although a more dilatory, exacting and wary policy might

finally extract something more than my own or even my client's hopes. Reputation gained for this species of skill is sure to be followed by more than an equivalent loss of character: shrewdness is too often allied to unfairness—caution to severity—silence to disingenuousness—wariness to exaction—to make me covet a reputation based on such qualities.

XXXIII. What is wrong is not the less so from being common. And though few *dare to be singular*, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong can not be professionally right, however it may be sanctioned by time or custom. It is better to be right with a few, or even none, than wrong, though with a multitude. If, therefore, there be among my brethren, any traditional moral errors of practice, they shall be studiously avoided by me, though in so doing I unhappily come in collision with what is (erroneously I think) too often denominated the policy of the profession. Such cases, fortunately, occur but seldom,—but when they do, I shall trust to that moral firmness of purpose which shrinks from no consequences, and which can be intimidated by no authority however ancient or respectable.

XXXIV. Law is a deep science; its boundaries, like space, seem to recede as we advance; and though there be as much of certainty in it as in any other science, it is fit we should be modest in our opinions, and ever willing to be further instructed. Its acquisition is more than the labor of a life, and after all can be with none the subject of an unshaken confidence. In the language, then, of a late beautiful writer (Mrs. Jameson) I am

resolved to "consider my own acquired knowledge but as a torch flung into an abyss, making the darkness visible, and showing me the extent of my own ignorance."

XXXV. I will never be voluntarily called as a witness in any cause in which I am counsel. Should my testimony however, be so material that without it my client's cause may be greatly prejudiced, he must at once use his option to cancel the tie between us in the cause, and dispense with my further services, or with my evidence. Such a dilemma would be anxiously avoided by every delicate mind, the union of counsel and witness being usually resorted to only a forlorn hope in the agonies of a cause, and becomes particularly offensive when its object be to prove an *admission* made to such counsel by the opposite litigant. Nor will I ever recognize any distinction in this respect between my knowledge of facts acquired before and since the institution of the suit, for in no case will I consent to sustain by my testimony any of the matters which my interest and professional duty render me anxious to support. This resolution, however, has no application whatever to facts contemporaneous with and relating merely to the prosecution or defense of the cause itself ; such as evidence relating to the contents of a paper unfortunately lost by myself or by others—and such like matters which do not respect the original merits of the controversy, and which, in truth, adds nothing to the one existing testimony ; but relates merely to matters respecting the conduct of the suit, or to the recovery of lost evidence : nor does it apply to the case of gratuitous counsel,—that is, to those who have expressly given their services voluntarily.

XXXVI. Every letter or note that is addressed to

me shall receive a suitable response, and in proper time. Nor shall it matter from whom it comes, what it seeks, or what may be the terms in which it is penned. Silence can be justified in no case; and though the information sought cannot or ought not to be given, still decorum would require from me a courteous recognition of the request, though accompanied with a firm withholding of what has been asked. There can be no surer indication of vulgar education than neglect of letters and notes; it manifests a total want of that tact and amenity which intercourse with good society never fails to confer: But that *dogged silence* (worse than a rude reply) in which some of our profession indulge on receiving letters offensive to their dignity, or when dictated by ignorant importunity, I am resolved never to imitate,—but will answer every letter or note with as much civility as may be due, and in as good time as may be practicable.

XXXVII. Should a professional brother, by his industry, learning, and zeal, or even by some happy chance, becomes eminently successful in causes which give him large pecuniary emoluments, I will neither envy him the fruits of his toils or good fortune, nor endeavour by any indirection to lessen them, but rather to strive to emulate his worth, than enviously to brood over his meritorious success and my own more tardy career.

XXXVIII. Should it be my happy lot to rank with, or take precedence of, my seniors, who formerly endeavoured to impede my onward cause, I am firmly resolved to give them no cause to suppose that I remember the one, or am conscious of the other. When age and infirmities have overtaken them, my kindness will teach them the loveliness of forgiveness. Those again who aided me;

when young in the profession shall find my gratitude increase in proportion as I become the better able to sustain myself.

XXXIX. A forensic contest is often no very sure test of the comparative strength of the combatants, nor should defeat be regarded as a just cause of boast in the victor, or of mortification in the vanquished. When the controversy has been judicially settled against me, in all courts, I will not "fight the battle o'er again," *coram non judice ;* nor endeavour to persuade others, as is too often done, that the courts were prejudiced—or the jury desperately ignorant—or the witnesses perjured—or that the victorious counsel were unprofessional and disingenuous. In such cases, *Credat Judaeus Apella!*

XL. Ardor in debate is often the soul of eloquence, and the greatest charm of oratory. When spontaneous and suited to the occasion, it becomes powerful. A sure test of this is when it so alarms a cold, calculating and disingenuous opponent, as to induce him to resort to numerous vexatious means of neutralizing its force—when ridicule and sarcasm take the place of argument—when the poor devise is resorted to of endeavouring to cast the speaker from his well-guarded pivot, by repeated interruptions, or by impressing on the court and jury that his just and well-tempered zeal is but passion, and his earnestness but the exacerbation of constitutional infirmity—when the opponent assumes a patronizing air, and imparts lessons of wisdom and of instruction! Such opponents I am resolved to disappoint, and on no account will I ever imitate their example. The warm current of my feelings shall be permitted to flow on ; the influences of my nature shall receive no check ; the ardor and fullness of

my words shall not be abated—for this would be to gratify the unjust wishes of my adversary, and would lessen my usefulness to my client's cause.

XLI. In reading to the court or to the jury authorities, records, documents, or other papers, I shall always consider myself as executing a *trust*, and, as such, bound to execute it faithfully and honorably. I am resolved, therefore, carefully to abstain from all false or deceptious readings, and from all uncandid omissions of any qualifications of the doctrine maintained by me, which may be contained in the text or in the notes; and I shall ever hold that the obligation extends not only to word, syllables, and letters, but also to the *modus legendi*. All intentional false emphasis, and even intonations, in any degree calculated to mislead, are petty impositions on the confidence reposed, and whilst avoided by myself, shall ever be regarded by me in others as feeble devices of an impoverished mind or as frequent evidences of a disregard for truth, which justly subjects them to be closely watched in more important matters.

XLII. In the examination of witnesses, I shall not forget that perhaps circumstances, and not choice, have placed them somewhat in my power. Whether so or not, I shall never esteem it my privilege to disregard their feelings, or to extort from their evidence what, in moments free from embarrassment, they would not testify. Not will I conclude that they have no regard for truth and even the sanctity of an oath, because they use the privilege, accorded to others, of changing their language, and of explaining their previous declaration. Such captious dealings with the *words* and *syllables* of a witness ought to produce in the mind of an intelligent jury only a

reverse effect from that designed by those who practice such poor devices.

XLIII. I will never enter into any conversation with my opponent's client, relative to his claim or defense, except with the consent *and* in the presence of his counsel.

XLIV. Should the party just mentioned have no counsel, and my client's interests demand that I should still commune with him, it shall be done in writing only —and no verbal response will be received. And if such person be unable to commune in writing, I will either delay the matter until he employs counsel, or take down in writing his reply in the presence of others; so that, if occasion should make it essential to avail myself of his answer, it may be done through the testimony of others, and not by mine. Even such cases should be regarded as the result of unavoidable necessity, and are to be resorted to only to guard against great risk, the artifices of fraud, or with the hope of obviating litigation.

XLV. Success in any profession will be much promoted by good address. Even the most cautious and discriminating minds are not exempt from its influence; the wisest judges, the most dispassionate juries, and the most wary opponents, being made thereby, at least, more willing auditors—and this, of itself, is a valuable end. But whilst address is deservedly prized, and merits the highest cultivation, I fully concur in sentiment with a high authority, that we should be "respectful without meanness, easy without too much familiarity, genteel without affection, and insinuating without any art or design."

XLVI. Nothing is more unfriendly to the art of pleasing than *morbid timidity*—(*bashfulness-mauvaise honte*). All life teems with examples of its prejudicial influence, showing that the art of rising in life has no greater enemy than this nervous and senseless defect of education. Self-possession—calmness—steady assurance—intrepidity—are all perfectly consistent with the most *amiable modesty*, and none but vulgar and illiterate minds are prone to attribute to *presumptuous assurance* the apparently cool and unconcerned exertions of young men at the bar. A great connoisseur in such matters says, that "What is done under concern and embarrassment is sure to be ill done;" and the Judge (I have known some) who can scowl on the early endeavors of the youthful Advocate who has fortified himself with resolution, must be a man poor in the knowledge of human character, and, perhaps, still more so in good feelings. Whilst, therefore, I shall every cherish these opinions, I hold myself bound to distinguish the arrogant, noisy, shallow, and dictatorial impudence of some, from the gentle, though firm and manly, confidence of others—they who bear the white banner of modesty, fringed with resolution.

XLVII. All reasoning should be regarded as a philosophical process—its object being conviction by certain known and legitimate means. No one ought to be expected to be convinced by loud words—dogmatic assertions—assumption of superior knowledge—sarcasm—invective;—but by gentleness, sound ideas, cautiously expressed—by sincerity—by ardor without extravasation. The minds and hearts of those we address are apt to be closed, when the lungs are appealed to instead of logic; when assertion is relied on more than proof; and when

sarcasm and invective supply the place of deliberate reasoning. My resolution, therefore, is to respect courts, juries, and counsel as assailable only through the medium of logical and just reasoning ; and by such appeals to the sympathies of our common nature, as are worthy, legitimate, well-timed and in good taste.

XLVIII. The ill success of many at the bar is owing to the fact that their *business is not their pleasure.* Nothing can be more unfortunate than this state of mind. The world is too full of penetration not to perceive it, and much of our discourteous manner to clients, to courts, juries and counsel, has its source in this defect. I am therefore, resolved to cultivate a *passion* for my profession ; or, after a reasonable exertion therein, without success, to abandon it. But I will previously bear in mind, that he who abandons any profession will scarcely find another to suit him ; the defect is in himself ; he has not performed his duty and has failed in resolutions, perhaps often made, to retrieve lost time, the want of of which firmness can give no promise of success in any other vocation.

XLIX. Avarice is one of the most dangerous and disgusting of vices. Fortunately its presence is oftener found in age than in youth ; for if it be seem as an early feature in our character, it is sure, in the course of a long life, to work a great mass of oppression, and to end in both intellectual and moral desolation. Avarice gradually originates every species of indirection. Its offspring is meanness ; and it contaminates every pure and honorable principle. It can consist with honesty scarce for a moment without gaining the victory. Should the young

practitioner, therefore, on the receipt of the first fruits of his exertions, perceive the slightest manifestations of this vice, let him view it as his most insidious and deadly enemy. Unless he can then heartily and thoroughly eradicate it, he will find himself, perhaps slowly, but surely, capable of unprofessional—mean—and, finally, dishonest acts, which, as they cannot long be concealed, will render him conscious of the loss of character ; make him callous to all the nice feelings ; and ultimately so degrade him, that he consents to live upon arts, from which talents, acquirements and original integrity would certainly have rescued him, had he at the very commencement, fortified himself with the resolution to reject all gains save those acquired by the most strictly honorable and professional means. I am, therefore, firmly resolved never to receive from any one a compensation not justly and honorably my due ; and if fairly received, to place on it no undue value ; to entertain no affection for money, further than as a means of obtaining the goods of life,—the art of *using money* being quite as important for the avoidance of avarice, and the preservation of a pure character, as that of *acquiring it.*

With the aid of the foregoing resolutions, and the faithful adherence to the following and last one, I hope to attain eminence in my profession, and to leave this world with a merited reputation of having lived an honest lawyer.

L. Last Resolution. I will read the foregoing forty-nine resolutions twice every year, during my professional life.

Following are some of the observations or rules of Judge Donovan with respect to—

THE COURT ROOM.

1. Lawyers waste too much time in talking; rely too much on it; tire a court too often by it; repeat a story until it is threadbare and loses snap, pitch, or meaning.

2. As is repeatedly shown, to cross-examine a smart woman, boy, girl, or man is suicidal. It lets them get the laugh on counsel or the cry on witness, and either is killing to the purpose. Why will young lawyers forget this? Why will they fool with edge-tools in darkness?

3. A good lawyer will not bluster. No boxer, rider, racer, or ball-player even would start with a flourish; coolness proves ability, strength, and reserve power; it begets confidence; it is wisdom in Court practice.

4. That your witnesses are candid is a strong lever. A silly, half-witted, half-captious "smart Aleck" is worse than no witness. Look out about being ridiculed. It is a powerful weapon.

5. More cases—ten to one— are lost than gained by tring to dig from the enemy what you should leave alone ("never wake a sleeping dog"), and rely on your own law and testimony.

6. Disputing with the Court after adverse ruling is a weakness. It's idle and fruitless. It decides cases for the jury that they might decide otherwise, and yet fear to go contrary to the Court's ruling—once emphasised.

7. Good lawyers know what they want and stop with it. Ask no questions that may be answered for the enemy.

Leave what is done where a layman can notice it. Argue discrepancies with the jury, and never with witnesses.

8. Learn to rely on substantial, not trivial matters. Do the Lincoln act—catch the middle of cases and hold that part up like a painting to the Court or jury.

9. Make the brief less wordy—more meaty and direct. Three good citations are worth ten poorer ones. Single page briefs are always of interest

10. Know your law and facts before starting. Both sides ready? Yes, your Honour. But how often otherwise!

11. Open clearly, tersely, candidly. Don't declare you will annihilate the enemy. You may not be so fortunate. Press a few points home with emphasis.

12. Persuade and please by good methods. Anger rarely wins anything but applause from spectators. That is rebuked, and leaves you weak from the rebuke it invites.

13. Question your parties carefully. A recent suit went to judgment when defendant was actually dead before it was started. An old firm-sign had misled the plaintiff. By all means, get the right parties.

14. Rely on the right of matters. If you win and go wrong, of what use is it? If you deceive a Court on the law, a new trial will follow. If you get an unjust verdict, will it avail anything?

15. Stand by your client, but take a fair position. He cannot ask you to clear him in all cases, if actually guilty. He will be pleased with a moderate sentence,—with a moderate verdict, with a fair adjustment.

16. Think for yourself. Try every case as if it never should be tried again. Try it clearly, fairly, wisely,

thoroughly—with your heart in your hand. "The hand is no stronger than the heart" in trial work.

17. Rely on yourself in the Court room. The counsel will pick up but a part of the facts that took days to learn from the witnesses. There is no counsel like the first one, with whom all facts are centred.

18. Verify your pleadings by comparison. Study them after cooling time—an amendment may be given, if asked for. Be not too certain, or too hasty. Law is a science. Trial work is a science. Victory is a science. Wisdom is a science. (Donovan's Tact in Court, 6th ed., pp. 8-10).

Donovan has laid down twenty-one rules as aids and suggestions in general practice, from observation, practice, reading, attendance at Courts in different States, and counsel with able attorneys. The rules are elaborated with reasons and illustrations in his "Tact in Court" (pp. 109-129), but for want of space the rules only are given below:—

TWENTY-ONE RULES OF PRACTICE.

1. Study every case by itself, thoroughly, and make a clear brief on both law and evidence.

2. Know what each witness will swear to, separately and together.

3. Open the case fully before any evidence is in.

4. Be forcible, firm, dignified, and clear.

5. Never be bluffed out of Court, but do not begin the bluff.

6. Brevity of facts, terseness of statements, tell best.

7. Never allow yourself to switch off.

8. Remember, juries do not know all the facts.

9. Show no uneasiness in temporary defeat.

10. Drop a bad witness ; Cross-examine only to gain by it.

11. Make your evidence reach the heart of the case.

12. The main point in law is good evidence.

13. Avoid frivolous objections ; save your forces for the main chance.

14. Speak clearly, carefully, and candidly.

15. Drop all examinations and arguments in the right place.

16. Let judge and jury know you mean what you say.

17. Consider your adversary powerful, and be ready for him.

18. Suits turn on evidence of facts, with the application of the law.

19. Twenty questions of fact to one of law will arise in Court trials.

20. See that you do your work well.

21. Hold on hard to the strong points of law and facts.

CHAPTER XIV.

EXAMINATION OF WITNESSES—GENERAL.

The examination of witnesses is one of the most important duties of an advocate. The oral evidence in a case is let in through the mouth of a witness and the task of the advocate is to help him as best as he can when testifying to the facts which he has come to depose.

The order in which witnesses are to be examined and the rules to be observed in conducting the examinations have been set forth in sec. 135 of the Evidence Act and the sections that follow it. The order of examination is as follows:—When a witness is placed in the witness-box, he must take an oath or make a solem affirmation that he will tell the truth, the whole truth and nothing but the truth. This is what Bentham calls the religious sanction of truth. The mode of administering the oath or affirmation is regulated by the Indian Oaths Act (X of 1873).

The evidence of witnesses shall be taken in open court in the presence and under the personal direction and superintendence of the Judge (Or. 18 r. 4). Witnesses may also be examined by commissioners appointed by court. As soon as the witness has taken the oath or been affirmed, he is examined by the party who called him as a witness; this is called his *Examination-in-chief or Direct Examination;* next the adverse party is at liberty to *cross-examine* him. Lastly he may be *re-examined* by the party who called him.

It is not the function of the Indian Evidence Act to lay down those practical suggestions gleaned from actual experience, which may serve as an useful guide to lawyers in conducting the examination of witnesses. It merely lays down certain general rules as to the examination of witnesses which are well-established and understood in English law, *viz.*, the order in which the witness are to be examined, the nature of the questions that may be put at these examinations, etc. The faculty of interrogating witnesses with effect is certainly, as Best puts it, "mainly the result either of natural acuteness or of long forensic experience."

A mere study of the rules relating to examination of witnesses cannot certainly make a man proficient in the art. The rules however afford useful guides and tell us at least what not to do. Long experience, natural talent and a study of the methods of successful advocates enable one to obtain proficiency in the art of cross-examination. Though there is no short cut, no royal road to proficiency, in the art of advocacy, though success in cross-examination "the rarest and the most difficult to be acquired of all the accomplishments of the advocate"—can only be acquired after years of practical experience and requires infinite patience and self control, yet a statement, of the principles, aims and uses of these examinations, a discussion of the methods to be employed in cross-examination and the offering of a few practical suggestions may prove instructive to the younger members of the profession. It is with this end in view that the following pages have been written. In dealing with the subject, the rules in the Evidence Act have been primarily kept in view.

Order of Examination.

The order of production and examination of witnesses shall be regulated by the law and practice relating to civil and criminal procedure, and in the absence of any such law by the discretion of the court (S. 135 Ev. Act). The rule governing the production of evidence and the order in which the witnesses are to be produced and examined depend upon the principles which govern the question as to who has the privilege or duty (as the case may be) of the *right to begin.* (See Or. XVIII, rr. 1, 2, 3, and *ante* p. 151). The law as to examination of witnesses in criminal cases is to be found in ss. 208, 251—257 Cr. P. Code.

Primarily it is the advocate's privilege to determine the order in which witnesses should be produced and examined. The arrangement of testimony is a matter of experience and skill. Intelligent and honest witnesses should be examined first in order that a favourable impression may be produced at the start of a case. The advocate cannot pick out the best witness unless he has during the stage of preparation ascertained by a preliminary examination the facts which the witnesses are expected to depose (*ante* p. 45). The first witness chosen should be intelligent and bold as he is likely to be cross-examined vigorously. If the first witness proves timid and breaks down, a bad impression will be created in the mind of the Court and the other witnesses too will feel discouraged. Some are of opinion that one of the best witnesses should be examined last for the finishing touch.

It has been held that though counsel has discretion, the court has power under s. 135 to direct the order in which the witnesses shall be examined—*per* Jenkins, C.J.

In the same case Woodroffe, J. said: "The Court has always the power to do this under s. 135 of the Evidence Act." (*In re Gopessur Dutt,* 16 C.W.N. 265: 39 Cal. 245). "I mean to decide this and no further. That in each particular case there must be some discretion in the presiding Judge, as to the mode in which the examination shall be conducted, in order best to answer the purposes of justice"—*per* Abbott, L.C.J., in *Bastin* v. *Carew,* 1824, Ry. and M. 127. The Court should be very slow to interfere with the discretion of counsel, as to the order in which witnesses should be examined (*Kedarnath* v. *Bhupendra,* 5 C.W.N. xv.) No mode of procedure can be more unsatisfactory than that of allowing the principal defendant in a suit to give his evidence before the plaintiff's case has been opened or the evidence of their witnesses given (*Satis* v. *Satis,* 45 M.L.J. 363, see also *Max Mink* v. *Shankar,* 116 P.W.R. 1908).

Competency of Witness.

The competency of witness is a question for the Judge. *Competency* to give evidence should be distinguished from *compellability* to give evidence. Generally all witnesses competent to depose are compellable to give evidence, but there are exceptions. Under s. 5 of the Banker's Book Evidence Act (XVIII of 1891) no officer of the bank shall in any proceeding to which the bank is not a party be compellable to produce any banker's book, or to appear as a witness, unless by order of the court for a special cause. In divorce or other matrimonial proceedings, the parties are competent witnesses but not compellable (see Divorce Act IV of 1869, ss. 51, 52). Distinction should also be made between compellability to be sworn or affirmed and compellability when sworn to

answer specific questions. Thus a witness though compellable to give evidence, may be privileged or protected from answering certain questions (v. ss. 122, 124, 125, 129 I.E.A.). Even if a witness be willing to depose to a certain thing, the Court will not allow disclosure in some cases (v. ss. 123, 126, 127 I.F.A.).

Under s. 118 I.E.A. all persons are competent to testify, unless the Court considers that by reason of tender years, extreme old age, disease or infirmity, they are incapable of understanding the questions put to them and of giving rational answers.

In civil proceedings the parties to the suit, and the husband or wife of any party to the suit shall be competent witness (s. 120). This is in accordance with English law. Proceedings under s. 488 Cr. P. Code are in the nature of civil proceedings within s. 120 and a person sought to be charged is a competent witness on his own behalf (*Tokee Bibee* v. *Abdul Khan,* 5 Cal. 536 ; see also *Rozario* v. *Ingles,* 18 Bom. 468). The effect of s. 118 is to make the husband a witness for all purposes and he is competent to prove non-access (*Howe* v. *Howe,* 38 Mad. 466 (F.B.). In proceedings for dissolution of marriage on the ground of adultery coupled with cruelty or desertion, the parties are competent witnesses, but they cannot be examined unless they offer themselves as witnesses or verify their cases by affidavit (ss. 51, 52 of Act IV of 1869).

In criminal proceedings against any person, the husband or wife of such person respectively, shall be a competent witness (s. 120 I.E.A.). This is opposed to the English law in which there are certain exceptions e.g., neglect to maintain or desertion of wife, offences against women and girls under Cr. Law Amendment Act 1855 ;

theft by husband or wife of each other's property &c.

A child is competent to testify, if it can understand the questions and give rational answers. Before a child of tender years is asked any questions bearing on the *res gestae*, the Court should test its capacity to understand and give rational answers and its capacity to understand between truth and falsehood (*Sheikh Fakir* v. *E.*, 11 C. W.N. 51 ; *Q. E.* v. *Lalu Sahai*, 11 Cal. 183 ; *Q. E.* v. *Ram Sewak*, 23 All. 90 ; see however *Nafar* v. *E.*, 41 Cal. 406). An infant need not be sworn unless such infant appears on strict examination by the Court to possess a sufficient knowledge of the nature and consequences of an oath, in other words the court has to ascertain from the answers to the questions propounded to the witness whether he appreciates the danger and impiety of falsehood (*Nafar* v. *K. E.*, 41 Cal. 406 ; *Fatu* v. *E.*, 61 I.C. 705 ; *In re China Venkadu*, 38 Mad. 550 ; *Hussain* v. *E.*, 76 I.C. 1037).

An accomplice is a competent witness against an accused person (s. 133 I.E.A.). S. 342 (4) Cr. P. Code and s. 5 Oaths Act forbid the administration of oath or affirmation to an accused person in a criminal case, and so an accused is incompetent to testify as a witness (see *Akhoy* v. *K. E.*, 45 Cal. 720). The disability has been removed in England by the Cr. Evidence Act 1898, 61 & 62 Vic. c. 36. If a juror or assessor is personally acquainted with any relevant fact, he is a competent witness (s. 294 Cr. P. Code).

Ordering out of Court.

The C. P. Code or the Evidence Act contains no specific rules for ordering witnesses out of court, though the English practice is substantially followed. Where

collusion among witnesses is suspected or there is reason to believe that any of them will be influenced or when required in the interests of justice, the Court will *pro prio motu* or on the application of either party, order all the witnesses to withdraw except the one under examination (*Southey* v. *Nash,* 7 C. & P. 632). The order does not usually extend to a witness who is also a party, nor to a solicitor in the action, nor to scientific witnesses. As parties are competent witnesses, they like other witnesses, may be excluded from Court during the examination of any other witness [*Outram* v. *Outram,* W.N. (77) 75]. The rule as to exclusion does not apply to counsel appearing for parties. There may be circumstances which may make it desirable to force counsel cited as a witness in the case not to appear but they do not render his appearance illegal (*Vemureddi* v. *E.,* 44 Mad. 916 : 62 I.C. 88).

CHAPTER XV.

EXAMINATION-IN-CHIEF.

The eyamination of a witness by the party who calls him is called examination-in-chief (s. 137 I.E.A.). The object of this examination is to get from the witness all the materials within his knowledge or such of them as he can testify to, relating to the case of the party calling him. Examination in chief must relate to *relevant* facts (s. 138). The issues in the case should be kept in view and questions relating to material and relevant facts should only be asked. Points of law should not be asked, nor should the witness be asked about his opinion or inferences from facts seen or heard by him. He has come to dispose to *facts* within his knowledge or recollection. On questions of science, skill, trade &c. an expert may give his opinion. Hearsay evidence should not be admitted. Every question is to be framed with some object in view. It is some times thought that to examine a witness in chief, is an easy affair. It is not so. It is said that Sir James Scarlett (Lord Abinger) laid so much stress on the examination-in-chief that he would do it himself without allowing any other lawyer who was engaged with him to examine his witness. The advocate must be self-possessed and proceed to examine his witness without agitation or nervousness. The witness is a total stranger to the surroundings of the Court and even if he be a man of strong intellect, he is likely to get confused and bewildered. His embarassment should be dispelled by asking questions in a calm and deliberate manner. He should be made to

feel that his examiner is there to help him and he can perfectly rely on him. Much depends on the examination in chief, and the examiner should not only make himself thoroughly acquainted with the entire facts of the litigation, but must also make himself acquainted with the particular facts which the witness will depose to, the nature and character of the witness and the degree of his intelligence. It is indispensable that the lawyer should by a previous examination or enquiry ascertain which of the facts are to be deposed to by which of the witnesses. A general desire to elicit all material facts from all the witnesses, by beating about the bush, often leads to undesirable results and embarasses the witnesses. The eccentricities or idiosyncracies of each witness should be borne in mind and questions should be framed in a manner that suits every witness best. The timid witness,—the stupid witness,—the talkative witness, each must be handled in a careful and different manner.

It is best to start examination with a few simple and introductory questions before approaching the subject on which the testimony of the witness is required. Leading questions on introductory or undisputed matters are not forbidden (s. 142). After the introductory questions are over, the witness should, as far as possible, be allowed to tell his story "in his own way" and the order of time and events should also be generally observed when framing questions. Once the witness is put on the right path, he should be allowed to go on with as few interruptions as possible. Too many questions will confuse the witness and disturb his train of thought. If the witness is not intelligent or is too timid, it may not be advisable to allow him to tell the story in his own way. He would often

be inclined to drift into irrelevant talks and a stupid witness may be best proceeded with by suggesting helpful questions. The witness may know much about the facts and yet may be unable to give a clear and consistent account, if left to himself. All the facts should be elicited from him by proper questions without leading him. This will depend much on the form of the questions and the maner in which they are put. Questions should be put in a natural and unaffected way without suggesting the answers. It cannot be expected that all witnesses will spontaneously state fully the facts which are within their knowledge. On many occasions they will omit important facts. The advocate must keep a viligent eye on the witness and the omissions must be supplied by appropriate questions. He must have an idea of the facts which a witness is expected to prove and after he has noted the omission of important facts, he should direct the attention of the witness to them by suitable questions. As leading questions are not allowed in examination-in-chief, the omitted fact should be called to the mind of the witness by framing an unobjectionable question. The object may be sometimes achieved by drawing the attention of the witness to a place, person or subject. In *Lincoln* v. *Wright*, 4 Beav. 166, Lord Langdale said: "It is impossible to examine a witness without referring to or suggesting the subject on which he is to answer." If the advocate is unable to frame a question without making it leading in form, the better course would be to ask the Court to draw the attention of the witness by a question which it thinks best under the circumstances.

"It is the duty of counsel to bring out clearly and in proper chronological order every relevant fact in support

of his client's case to which the witness can depose. The task is more difficult than may at first sight appear. The timid witness must be encouraged; the talkative witness repressed; the witness who is too strong a partisan must be kept in check. And yet counsel must not suggest to the witness what he is to say. An honest witness, however, should be left to tell his tale in his own way with as little interruption from counsel as possible."

"In criminal cases, the duty of counsel for the prosecution is wider. It is the practice and probably the duty, of a prosecuting counsel to ask a witness questions favourable to the prisoner; for he must lay all the material evidence before the Court, whether it tells in favour of the prisoner or not, and not unduly press for a conviction" (Powell Ev. 9th Ed. p. 526). As to the duties of public prosecutor, see *ante* Ch. X.

Mr. Birrell in his admirable biographical sketch of Sir Frank Lockwood quotes from the *Birmingham Daily Post*, an address made by that eminent law officer in March 1893, in which the following paragraph appears:—

"He believed that the examination of a witness in chief, or the direct examination of witnesses, as it was called in Ireland, was very much underrated in its significance and its importance. If they had to examine a witness, what they had got to do was to induce him to tell his story in the most dramatic fashion without exaggeration; they had got to get him, not to make a mere parrot-like repetition of the proof, but to tell his own story as though he were telling it for the first-time—not as though it were words learnt by heart—but if it were a plaintive story, plaintively telling it. And they had got to assist him in the difficult work. They had got

to attract him to the performance of his duty, but woe be to them if they suggested to him the terms in which it was to be put. They must avoid any suspicion of leading the witness while all the time they were doing it. They knew perfectly well the story that he was going to tell ; but they destroyed absolutely the effect if every minute they were looking down at the paper on which his proof was written. It should appear to be a kind of spontaneous conversation between the counsel on the one hand and the witness on the other, the witness telling artlessly his simple tale, and the counsel almost appalled to hear of the iniquity under which his client had suffered. It was in this way, and in this way alone, that they could effectively examine a witness (Wrottesley, pp. 36, 37).

The advocate should never lose his temper. All witnesses do not possess the same understanding or intelligence. Some are stupid, some pert while others are loquacious and exhibit a tendency to prove too much. No two witnesses can be treated in the same manner. If a witness is stupid and fails to catch the point quickly, allowance should be made for his deficiency and the advocate should make repeated attempts to call his attention to the point on which he wants his testimony. If the witness is talkative and embarks upon a long narrative irrevelant to the matter in issue, he should be gently rebuked and kept to the point. If he is pert, he should be treated in such a manner that he can realise soon that frivolity will not be tolerated in a Court of justice. A timid witness should be treated kindly and encouraged and once confidence is established, he will give his testimony without feeling nervous. If a witness proves unfriendly or adverse, he should, if possible, he dismissed as soon as

circumstances permit (see *post* Brown's rule No. 4). If however this cannot be done without prejudice to the examiner's case, it is better to expose him and reveal his true character, as the adverse party is very likely to take advantage of his bias or hostility. It may go a great way in undoing the mischief which his unfavourable answers may have made. If it is made to appear that his hostility was known to you, but you were compelled to call him, it will show him in his true light. Cox says: "Make no secret of his enmity; on the contrary you have most to dread when his manner and tone do not discover his feelings. If you are satisfied beyond doubt of his hostility, and he should, as is often seen, assume a frank and friendly mien in the witness box, instead of accepting his approaches reject them with indignation, let him see that you are not to be imposed upon, and endeavour to provoke him to the exhibition of his true feelings.

"When the Court is satisfied that the witness is really an adverse one, the strict rule which forbids leading questions will be relaxed, and you will be permitted to conduct the examination somewhat more after the manner of a cross-examination. You may put leading questions, but you may not discredit him, whatever may have been the damage done to you by his testimony, and however obvious the animus which has misrepresented the facts purposely for the injury of your cause. He is still your witness, and having chosen to call him, and thereby to ask the jury to believe his story, it is not competent to you to turn round when you find he does not suit your purpose, and endeavour to show to the jury that he is unworthy of credit. Between this Scylla and Charybdis lies your difficult course in dealing with such a witness.

"As a general rule, the less you say to such a witness the better for you. Bring him directly to the point which he is called to prove, frame your questions so that they should afford the least possible room for evasion, or, what is still worse, explanation. Avail yourself of liberty to lead as soon as you can, that is, as soon as you have laid the foundation for it by showing from his manner that the witness is really adverse. You should not conceal your knowledge of the fact that the witness is hostile. Provoke him when he appears to be friendly, to an exhibition of hostility in order to show that he is an enemy in the guise of a friend. By pursuing this course you will prevent the witness from imposing upon you, and will expose his treachery and perfidy to the Court and jury." (Cox's Advocate).

An advocate should not cross-examine his own witness, because it will create a doubt that he does not consider the testimony reliable. The rule is of course subject to exceptions *e.g.*, when the witness is adverse or a stupid one, he may be cross-examined with the permission of the Court. Harris says: "*Never cross-examine your own witness.* This again seems remarkably obvious. But it requires an effort to obey it nevertheless. You will hear an advocate cross-examine his witness over and over again without knowing it, if he have not the restraining hand of his leader to check him."

"Before Mr. Justice Hawkins, not long since, a junior was conducting a case, which seemed pretty clear upon the bare statement of the prosecutor. But he was asked: "Are you *sure* of so and so?" "Yes," said the witness. "Quite?" inquired the counsel. "Quite," said the witness. "You have no doubt?" persisted the counsel.

"Well" answered the witness, "I haven't much doubt, because I asked my wife."

Mr. Justice Hawkins: "You asked your wife in order to be sure in your own mind?" "Quite so, my lord." "Then you had some doubt before?" "Well, I may have had a little, my lord."

This ended the case, because the whole question turned upon the absolute certainty of this witness's mind. (Harris' Advocacy 14th Ed. p. 37).

While a witness is being examined, the opposing advocate must have his attention rivetted on the questions and the answers, so that he may raise an objection immediately an attempt is made to let in irrelevant or inadmissible evidence or a question is put in an objectionable form. Questions relating to admissibility of evidence arise all on a sudden and in order that an advocate may successfully combat the situation, he must have a thorough mastery of the rules of evidence. Objections to questions should be made at the earliest possible opportunity and the Court's decision should be given then and there. The person objecting must be prepared to state his reasons for objection. Failure to object at the proper time, i.e., when the evidence is tendered may operate as waiver. If evidence clearly inadmissible has been admitted without objection in direct contravention of an imperative provision of law, it is open to the opposite party to challenge it at any later stage (*Sudhyana* v. *Gour*, 35 C.L.J. 473). But consent or want of objection to the wrong manner in which relevant evidence should be brought on the record disentitles a party from objecting in appeal (38 Mad. 160 following 19 All. 76, 92 P.C.).

When evidence is rejected at the trial, the party

proposing it should formally tender it to the Judge and request him to make a note of it (Tay. s. 1882 A). The Court may itself or on the application of a party take down any particular question and answer or any objection to any question (Or. 18, r. 10). When a question is objected to and the Court allows it to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon (Or. 18, r. 11).

Cox says: "Great keenness or perception and readiness of apprehension are requisite to the performance of this task. You will need to have the law of evidence at your finger's ends, that if the question be an improper one, you may interpose instantly *before the answer is given,* to forbid the witness to reply, and then not only to make your objection to the Court, but to support it by reasons. And here let us warn you against the fault of making too frequent and too frivolous-objections. Many inexperienced men appear to think, that by continually carping at the questions put by the other side to the witness, they are proving to the audience how clever they are. But this is a mistake. Such an exhibition of captiousness, whether affected or real, is offensive to the Court and to the jury. Nothing is more easy than to find opportunities for this sort of vanity, without starting objections actually untenable, because, in practice, a vast number of questions are put which in strictness are leading, and, therefore, if objected to, could not be permitted. But you should never object to a question as leading, merely because it is such, but when only it appears to you to be likely to have an effect injurious to your cause. And when you have occasion to make such an objection, do it good-

temperedly, and as appealing to the better judgment of your opponent, whether he does not deem it to be an improper question ; nor address the objection to the Court in the first instance but to your adversary, and only if he persists in putting it should you call upon the Court to decide between you which is right.

"But it is not only against improper leading questions you have to be upon the watch ; there are many others still more objectionable, which it will be your duty, by an instant objection, to present. As soon as the words have fallen from you opponent's lips and before the witness can have time to answer, you must interpose first, with an exclamation to the witness, 'Don't answer that', and then, turning to the Court, state what is your objection to the question, with your reasons for it. Your opponent will answer you. Then you will have the right of replying, and the Court will decide between you.

"There is perhaps, no part of the business of an advocate in which the fruits of experience are more obvious than in this. If you watch closely the examination of witnesses, in a trial where an experienced advocate is on one side and an inexperienced one on the other, you will see the practised man putting question after question, and eliciting facts most damaging to the other side which his adversary might have shut out by a prompt objection to them, but which he permits to pass without protest, because he is not sufficiently practised in the law of evidence to discern their illegality on the instant, or so much master of it as to give a reason for objection, even though he may have a sort of dim sense that the questions are wrong somehow, and he protests against leading questions, while he permits illegal questions destructive to his client to be

put without a murmur. On the other hand, when it comes his turn to examine his witnesses, and on the experienced man devolves the duty of watching, you will see how, in no single instance, is he suffered to tread over the traces ; but the strictest rules of evidence are enforced upon him, so that he sits down, leaving half his case undeveloped, while his adversary has brought out all that he desired to elicit." (Cox's Advocate).

Paul Brown's Golden rules for Examination-in-chief.

David Paul Brown one of America's leading advocates has laid down certain rules for examination-in-chief, which are acknowledged by competent authorities as safe guides. They are reproduced below :—

(1) If they are bold, and may injure your cause by pertness or forwardness, observe a gravity and ceremony of manner towards them which may be calculated to repress their assurance.

(2) If they are alarmed or diffident, and their thoughts are evidently scattered, commence your examination with matters of a familiar character, remotely connected with the subject of their alarm, or the matter in issue ; as, for instance,—Where do you live? Do you know the parties? How long have you known them? and the like. When you have restored them to their composure, and the mind has regained its equilibrium, proceed to the more essential features of the cause, being careful to be mild and distinct in your approaches, lest you may trouble the fountain again from which your are to drink.

(3) If the evidence of your own witnesses be unfavourable to you—which should always be carefully guarded against—exhibit no want of composure : for

there are many minds that form opinions of the nature or character of testimony chiefly from the effect which it may appear to produce upon the counsel.

(4) If you see that the *mind* of the witness is imbued with prejudices against your client, hope but little from such a quarter—unless there be some facts which are essential to your client's protection, and which that witness alone can prove ; either do not call him, or get rid of him as soon as possible. If the opposite counsel see the bias to which I have referred, he may employ it to your ruin. In judicial inquiries, of all possible evils, the worst and the hardest to resist is an enemy in the disguise of a friend. You cannot impeach him ; you cannot cross-examine him ; you cannot disarm him ; you cannot indirectly even, assail him ; and if you exercise the only privilege that is left to you and call other witnesses for the purpose of an explanation, you must bear in mind that instead of carrying the war into the enemy's country, the struggle is between sections of your own forces, and in the very heart, perhaps, of your own camp. Avoid this by all means.

(5) Never call a witness whom your adversary will be compelled to call. This will afford you the privilege of cross-examination. Take from your opponent the same privilege it thus gives you, and, in addition thereto, not only render everything unfavourably said by the witness doubly operative against the party calling him, but also deprive that of the power of counteracting the effect of the testimony.

(6) Never ask a question without an object—nor without being able to connect that object with the case if objected to as irrelevant.

(7) Be careful not to put your questions in such form

that if opposed for informality, you cannot sustain it, or, at least, produce strong reasons in its support Frequent failures in the discussion of points of evidence enfeeble your strength in the estimation of the jury, and greatly impair your hopes in the final result.

(8) Never object to a question put by your adversary without being able and disposed to enforce the objection. Nothing is so monstrous as to be constantly making and withdrawing objections; it indicates either a want of correct perception in making them, or a deficiency of reasons, or of moral courage in not making them good.

(9) Speak to your witness clearly and distinctly, as if you were awake and engaged in a matter or interest, and make him, also, speak distinctly and to your question. How can it be supposed that the Court and the jury will be inclined to listen, when the only struggle seems to be whether the counsel or the witness shall first go to sleep?

(10) Modulate your voice as circumstances may direct. "Inspire the fearful and repress the bold."

(11) Never begin before you are *ready*, and always finish when you have *done*. In other words, do not question for question's sake—but for an answer.

Manner in Examination-in-Chief.

The manner in which examination-in-chief should be conducted has already been referred to. The following paragraphs from Cox's admirable work entitled "*The Advocate: his Training, Practice, Rights and Duties*" contain valuable instructions:—

"Your *manner* in examination-in-chief should be very different from that which you assume in cross-examination. You are dealing with your own witness

whom you assume to be friendly to you, unless informed to the contrary. You must encourage him if he be timid, and win his confidence by a look and voice of friendliness. It often happens that witnesses, unaccustomed to Courts of Justice, are so alarmed at their own new position, that in their confusion they cannot at first distinguish between the friendly and the adverse counsel and they treat you as an enemy to be kept at bay, and to whom they are to impart as little as possible. It is then your care to set your witness right, and a kindly smile will often succeed in doing this. Do not appear to notice his embarrassment, for that is sure to increase it, but remove it quietly and imperceptibly, by pleasent looks, friendly tones, and words that have not the stern sound of a catechism, but the familiar request of a companion to impart a story which the querist is anxious to hear and the other gratified to tell. The most frightened witness may thus be drawn almost unconsciously into a narrative which, when he entered the witness box, had escaped the memory in his terror.

"Your questions in examination in chief should be framed carefully, and put deliberately. You never require in this that rapid fire of questions which is so often requisite in cross-examination. You should weigh every question in your mind before you put it, in order that it may be so framed as to bring out in answer just so much as you desire, and no more. You have time for this, if you are as quick of thought as an advocate should be, while the Judge is taking his note of the previous answer, but even if this be not sufficient for your purpose, you must not fear to make a deliberate pause. The Court will soon learn not to be impatient of your seeming slowness,

when it discovers that you have in fact abbreviated the work by a pause which has enabled you to keep the evidence strictly to the point at issue.

"Sometimes it demands considerable discretion to determine whether it is better to permit the witness to tell his own story in his own way, or to take him through it by questions. No rule can be laid down for this. It must depend upon your discernment at the moment. There is a class of minds who can recall facts by recalling all the associated circumstances, however irrelevant, they must repeat the whole of long dialogue, and describe the most trivial occurrence, of the time in order to arrive at any particular part of the transaction. With such you have no help for it but to let them have their own way. It is the result of a peculiar mental constitution, and endeavours to disturb their trains of association will only produce inextricable confusion in the ideas of the witness, and you will be farther than ever from arriving at your object. But if you are dealing with that other class of witness, happily more rare, who appear to have no trains of thought at all, who can observe no orders of events whose ideas are confused as to time, place, and person, your only chance of extracting anything to your purpose is to begin by requesting that they will only simply answer your questions, and falling in, as it were, with their own mental condition proceed to interrogate them, after their own fashion, with disconnected questions, and so endeavour to draw out of them isolated facts, which you will afterwards connect together in your reply, or which dovetail with the rest of the evidence, so as to form a complete story.

"This plan will often be found effective with such

witness, when all the usual methods of eliciting a narrative from them have been abandoned in despair ; of course it demands great tact and readiness ; but it is presumed that unless you possess these qualities you will not attempt to become an advocate."

Subject matter of Examination-in-Chief.

Relevant Facts.

The examination-in-chief should be confined to facts in issue or facts relevant to the issue. All facts are relevant which are capable of affording any reasonable presumption as to the facts in issue or the principal matters in dispute. As to the meaning of "Relevant" and "Facts in issue," see s. 3 Evidence Act. See also s. 5. The word 'relevant' in the Act means admissible—*per* Lord Hobhouse in 3 C.W.N. 268*n*. The various ways in which one fact may be so related to another as to be relevant to it, are described in ss. 5—55 of the Evidence Act. Relevants facts may however be excluded on ground of public policy or privilege.

The facts deposed to must be within the personal knowledge of the witness and hearsay is ordinarily excluded. The common from of hearsay is something which is heard from a third party. There are some exception to the hearsay rule *e.g.*, admissions, declarations against interest, statement made in the course of business, statement in pubilc documents &c. &c. (ss. 17, 32, 35, 36, 37 &c., &c.). Oral evidence should be direct (s. 60). The questions should be confined to matters of *fact* (s. 3) and not of law. Inferences, opinions, or beliefs (unless they come within ss. 45—51) of witnesses are to be excluded. As to prove of motive or intention, see

ss. 8, 14, 15. Witnesses are not allowed to state their views on matters of moral and legal obligation, or on the manner in which other persons would probably have been influenced, had the parties acted in one way or rather than another. To put it briefly, a witness may not, on other than scientific subjects, be asked to state his opinion upon a question of fact which is the very issue for the jury, as for instance whether a driver is careful, a road dangerous, or an assault or homicide justifiable. Nor may he be asked whether a clause in a contract restricting trade is reasonable or unreasonable, for this is the question for the Judge (Taylor, ss. 1414—1421).

Facts showing any special means of knowledge, opportunities of observation, reason for recollection or belief or other circumstances increasing the witness's competency to speak of the particular case, may be elicited in chief, as well as impugned in cross-examination. (Phipson's Ev., p. 466).

Leading questions.

Leading questions or questions pregnant with suspicion that the object is to lead should never be asked in examination-in-chief (ss. 141, 142 Ev. Act. As to this see *post*). If a question is framed in a manner which suggests the answer which the interrogator wants to have, it would be prompting a witness, which certainly is no business of the advocate. An artful way of doing this is to put in the question two alternatives which at once give a hint to the witness to pick out the one desired, *e.g.*, was X present at the time or was he not? The proper question would be: Who were present? Leading questions are not ordinarily allowed in exam-in-chief. The

reason for the rule is that the witness is favourable to the party calling him, and so if he is led he would give his evidence in the way suggested. The rule, however is not inflexible and the Court has a very large discretion in the matter. The exception to the rule is to be found in s. 142 of the Evidence Act (see *post* Ch. XVI).

Documents.

Whenever a witness is examined as to the contents of the document made by him, he should be always allowed to speak with the document before him' (s. 159). A witness may testify about the identity or execution of a document (not a document required by law to be attested), but he cannot speak about the contents of it or be allowed to contradict, vary, add or substract from its terms. The terms of a contract, grant &c., must be proved by the document itself (ss. 91, 92). When originals consist or voluminous documents, their general result may be stated by witness (s. 65). A witness may refresh his memory by referring to any writing made by himself contemporaneously with the transaction. He may also refer to a writing made by another person and read by him, soon after it was made (s. 159). If the original is lost, some evidence must first be given about the loss before giving secondary evidence of its contents. If document is in the possession or power of the adverse party the law requires that previous notice should be given for its production (s. 66). In the case of documents which the law requires to be attested, an attesting witness should be called if alive and subject to the process of the court. (s. 68). If execution is not specifically denied, any other person who witnessed the execution and attestation may prove the document (Proviso to s. 68).

Corroboration.

Questions tending to corroborate evidence or relevant facts are admissible (see s. 156). Whenever any statement relevant under ss. 32 and 33 are proved, all matters may be proved in order to contradict or to corroborate it, or to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness (s. 158). Previous testimony of a witness may be proved to corroborate his later testimony to the same effect (see s. 157).

Discrediting one's own Witness.

Ordinarily a party is not allowed to impeach the credit of the witness called by him, but it may sometimes be done with the consent of the Court (sec. 155 ; see *post*). A party is not generally allowed to impeach his witness's credibility or general reputation for veracity by general evidence of bad character. But if the witness turns hostile and takes him by surprise, he may *with the leave of the Court,* impeach his credit (see s. 155 and *post.*).

Assumption.

Questions which assume facts to have been proved which have not been proved, or that particular answers have been given which have not been given, will not at any time be permitted (Taylor, s. 1404).

CHAPTER XVI.

CROSS-EXAMINATION.

Cross-examination is the examination of a witness by the adverse party (s. 137 Evidence Act) *i.e.* the party opposed to the one that calls him. Best, however, puts a somewhat wider interpretation of the term and defines cross-examination or examination *ex adverso* as "the interrogation by the advocate of a witness hostile to his cause, without reference to the form in which the witness comes before the Court." The object of cross-examination is:—(1) to sift the evidence given and to destroy or qualify or weaken the force of the testimony regarding the facts in issue ; (2) elicit facts in your favour from the answer of the witness (3) to show that he is unworthy of belief, by impeaching the credit of the witness ; and (4) to establish your own case with the help of your adversary's witness. It is one of the most powerful weapons in the hand of the advocate for discovering truth and exposing falsehood or discrepancy, provided the cross-examination is conducted with skill. Success in the art cannot be achieved without a profound knowledge of human mind and motives, and patience and practical experience. Some men are endowed with a natural genius for cross-examination. A study of the well known rules on the subject and the methods of great advocates afford considerable help in acquiring proficiency.

Serjeant Ballantyne says on the subject of cross-examination:—"By this agent, if skillfully used, false-

hood ought to be exposed, and exaggerated statements reduced to their true dimensions. An unskilful use of it, on the contrary, has a tendency to uphold rather than destroy. If the principles upon which cross-examination ought to be founded are not understood and acted upon, it is worse than useless, and it becomes an instrument against its employer. The reckless asking of a number of questions on the chance of getting at something is too often a plan adopted by unskilled advocates, and noise is mistaken for energy.

"The object of cross-examination is not to produce startling effects but to elicit facts, which will support the theory intended to be put forward." (Serjeant Ballantyne's Experiences).

Cox says: "Do not understand, however, that we are unconscious of the difficulty of conducting a cross-examination with creditable skill. It is undoubtedly a great intellectual effort ; it is the direct conflict of the mind with mind ; it demands not merely much knowledge of the human mind, its faculties, and their *modus operandi*, to be learned only by reading, reflection and observation, but much experience of man and his motives derived from intercourse with various classes and many persons, and above all, by that practical experience in the art of dealing with witnesses, which is worth more than other knowledge will materially assist, but without which no amount of study will suffice to accomplish an advocate." (Cox's Advocate).

In *Meer Sujad Ali* v. *Kasheenath*, 6 W.R. 181 pp. 182-183, Norman J., said :—

The essence of cross-examination is, that it is the interrogation by the advocate of one party of a witness

called by his adversary with the object either to obtain from such witness admissions favourable to his cause or to discredit him. The cross-examination is the most effective of all means of extracting truth and exposing falsehood. We think it not out of place to refer to a celebrated passage of Quintilian on the subject of cross-examination, of which we have given a free translation [The passage in Latin is quoted in Best on Evidence 11th Ed. s. 653 from the *Inst. Orata lib*, 5, c. 7 and also in Taylor, 10th Ed. pp. 1032-33 foot-note]. He says:—"In dealing with a witness who is to be compelled to speak the truth against his will, the greatest success consists in drawing out what he wishes to keep back. This can only be done by repeating the interrogation in greater detail. He will give answer which he thinks do not hurt his cause; and afterwards from many things which he will have confessed, he may be led to such a strait that what he will not say he cannot deny. For, as in an oration, we generally collect scattered proofs, which singly do not appear to press on the accused, yet by being put together prove the charge, so a witness of this sort should be asked many things as to what went before,—what came after—as to place, time and persons and other things, so that he may fall upon some answer after which he must necessarily either confess what is desired or contradict his former statements. If this does not happen, it may become apparent that he will not speak, or he may be drawn out and defeated in some falsehood foreign to the cause: or by being led on to say more than the matter requires in favour of the accused, the judge may be led to suspect him, which will damage his case not less if he had spoken the truth, against the accused. It sometimes happens

that the testimony given by a witness is inconsistent with itself. Sometimes (and that is the more frequent case) one witness contradicts another. A skilful interrogation may produce by art that which usually happens accidentally. Apart from the cause, witness are generally asked many questions which may be useful, as to the lives of other witnesses, as to their own character and position, any crimes they have committed, their friendship or enmity to the parties,—in the answers to which, they may either make some useful admission, or be detected in a falsehood or the desire of injuring the opposite party." The faculty of interrogating witness effectively is one which requires a careful study and a considerable knowledge of human nature. It is one of the highest arts of an advocate, and can only be acquired after years of observation and practical experience."

The exercise of the right of cross-examination is one of the most efficacious tests for the discovery of truth. By it, the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts of which he has used those means, his powers of discernment, memory and description, are all fully investigated and ascertained and submitted to the consideration of the jury, who have an opportunity of observing his demeanour, and of determining the just value of his testimony. It is not easy for a witness, subjected to this test, to impose on a Court or jury ; for, however artful fabrication of falsehood may be, it cannot embrace all the circumstances, to which a cross-examination may be executed. (Taylor, s. 1128).

Manner in Cross-examination.

As to the manner in which cross-examination should be conducted so as to produce the greatest effect, there are generally two styles (*ante* p. 128). One is known as the 'savage' or direct style. It is to go straight against the witness and attack him directly with a view to extort the truth by terrifying and bullying him into submission. It succeeds only in the hands of advocates of commanding personality and even then it is not safer unless they are sure of their ground or the witness is overpowered by threat. A fierce attack at the outset makes the witness defiant, specially if he is a man of strong nerves. It can seldom succeed in the case of a witness who is a practised rogue and has experience of similar onslaught. A feeling that the advocate suspects his veracity and attempts to prove him a liar, rouses his passions and makes him stiff. He prepares himself fully for the attack and exerts his utmost to baffle the advocate. Wellman says: "The only lawyer I ever heard employ this roaring method successfully was Benjamin F. Butler. With him politeness or even humanity, was out of the question. And it has been said of him that concealment and equivocation were scarcely possible to a witness under the operation of his methods." But Butler had a wonderful personality. He was aggressive and even pugnacious, but picturesque withal; witnesses were afraid of him. It must be remembered that Butler had a contempt for scruple which would hardly stand him in good stead at the present time. Once he was cross-questioning a witness in his characteristic manner. The judge interrupted to remind him that the witness was a Harvard Professor. "I know it, Your Honour," replied Butler, "We hanged one of

them the other day." (Wellman's Art of Cross-Examination, 1925, p. 11).

Sir Charles Russell, Lord Russel of Killowen, was altogether the most successful cross-examiner of modern times. Lord Coleridge said of him that 'Russell was the biggest advocate of the century.' It has been said that his success in cross-examination, like his success in everything, was due to his force of character. It was his striking personality, added to his skill and adroitness, which seemed to give him his overwhelming influence over the witnesses whom he cross-examined. Russell is said to have had a wonderful faculty for using the brain and knowledge of other men.

Russell's maxim for cross-examination was, 'Go straight at the witness and at the point ; throw your cards on the table ; mere finesse English juries do not appreciate.' Speaking of Russell's success as a cross-examiner, his biographer, Barry O'Brien says: "It was a fine sight to see him rise to cross-examine. His very appearance must have been a shock to the witness,—the manly, defiant bearing, the noble brow, the haughty look, the remorseless mouth, those deep-set eyes, widely opened, and that searching glance which pierce the very soul." 'Russell,' said a member of the Northern Circuit, 'produced the same effect on a witness that a cobra produced on a rabbit.' (Wellman, pp. 177-179).

The other style which is by far the most successful and pleasant, is to approach the witness in a courteous and friendly manner. This will disarm opposition from the beginning and establish a sort of confidence which is so very necessary in eliciting answers in support of your case. The witness has a dread of you. He knows that

you will try to put him in a hole at the first opportunity ; he anticipates a sharp attack and has come prepared for the contest. If you encourage him in a friendly manner without permitting him to think that his answers have surprised you, he enters into a frank discussion ; he is put off his guard and forgets the points which he has come to uphold. The witness should be quietly and imperceptibly led to a position which would ultimately compel him to give away without knowing that he did so. And once the weak points are thus found out, the advocate will pursue them and the witness will soon find himself in a corner. Walsh says : "This method of cross-examination by direct attack, is as a rule the least successful. It is certainly, the least pleasant to hear, and the least edifying. The insidous, half-friendly, half-confidential method is usually the more successful, merely because if a witness is attempting to deceive it is more apt to put him off his guard (Walsh's Advocate p. 146). If from the attitude and expression of the cross-examiner, the witness at the commencement, suspects that his veracity is doubted, he will be at once put on his guard and will prepare himself fully for sticking to his story in the examination-in-chief. What is the secret of the art of cross-examination? Hawkins, J., (afterwards Lord Brampton) is said to have given the answer in one word—*Patience*. "It is building a brick wall round a man. You ask your question, and the answer enables you to plant one brick here. Then another question—and another brick in quite a different place. If you ask your questions politely, very likely he will place half a dozen bricks in position himself. They are scattered all over the place, but you have your plan. By degrees the ring is complete. The wall rises. And

he finds he can not get out." That is the patient and dogged way.

Even man has his own style of cross-examination ; but what is needed most is an unruffled temper and courtsey to both court and witness. Bullying and blustering or thumping the table are out of place in a Court of Justice and seldom succeed. Such conduct only helps in drawing the sympathy of the Court or the jury towards the witness. Good manner and good temper are indispensable requisites of a good advocate.

Bullying and browbeating a witness, misleading him, as for instance by putting questions which assume facts to have been proved which have not been proved, or that particular answers have been given contrary to the fact—questioning him in a manner which assumes that he has been lying throughout the whole or the greater part of his examination-in-chief—confusing him when stupid—terrifying him when timid—will oftener than otherwise fail to search the mind and conscience of an adverse witness, when suavity of manner, gentleness and courtesy will surely put him off his guard, while rapid and subtle questioning elicits from his innumerable facts *insignificant* as they appear to him at the moment, but which when put together and arranged, create a whole, in which the most ignorant beholder instinctly recognizes the truth. (Field, 447-448).

Cox says: "There are two styles of cross-examination, which we may term the savage style and the smiling style. The aim of the savage style is to terrify the witness into telling the truth ; the aim of the smiling style is to win him to a confession. The former is by far the most frequently in use, specially by young advocates, who

probably imagine that a frown and a fierce voice are proofs of power. Great is their mistake. The passions arouse the passions. Anger, real or assumed, kindles anger. An attack stimulates to defiance. By showing suspicion of a witness, you insult his self-love—you make him your enemy at once—you arm his resolution to resist you—to defy you—to tell you no more than he is obliged to tell—to defeat you if he can.

"Undoubtedly there are cases where such a tone is called for, where it is politic as well as just ; but they are rare, so rare that they should be deemed exceptional. In every part of an advocate's career, good temper and self-command are essential qualifications ; but in none more so than in the practice of cross-examination.

"It is marvellous how much may be accomplished with the most difficult witness, simply by good humour and smile ; a tone of friendliness will often succeed in obtaining a reply which has been obstinately denied to a surly aspect, and a threatening or reproachful voice. As a general rule, subject to such very rare exceptions as scarcely to enter into your calculations, you should begin your cross-examination with an encouraging look, and manner, and phrase. Remember that the witness knows you to be on the other side ; he is prepared to deal with you as an enemy ; he anticipates a badgering ; he thinks you are going to trip him up, if you can ; he has, more or less, girded himself for the strife. It is amusing to mark the instant change in the demeanour of most witnesses when their own counsel has resumed his seat, and the advocate on the other side rises to cross-examine. The position, the countenance, plainly show what is passing in the mind. Either there is fear, or, more often,

defiance. If you look fierce and look sternly, it is just what had been expected, and you are met by corresponding acts of self-defence. But if, instead of this, you wear a pleasant smile, speak in a kindly tone, use the language of a friendly questioner, appear to give him credit for a desire to tell the whole truth, you surprise, you disarm him ; it is not what he had anticipated, and he answers frankly your questionings." (Cox's Advocate).

There are occasions where a sharp tone and an appropriate expression of face are called for in order to produce the desired effect. It can only be successfully employed by advocates of outstanding merit. The following extract from O'Brien's Life of Lord Russell, will clearly illustrate the point:

"Once, when cross-examining a witness by the name of Sampson, who was sued for libel as editor of the *Referee,* Russell asked the witness a question which he did not answer. 'Did you hear my question?' said Russell *in a low voice.* 'I did,' said Sampson. 'Did you understand it?' asked Russell, *in a still lower voice.* 'I did,' said Sampson. 'Then,' said Russell, *raising his voice to its highest pitch,* and looking as if he would spring from his place and seize the witness by the throat, 'Why have you not answered it? *Tell the jury* why you have not answered it.' A thrill of excitement ran through the court room. Sampson was overwhelmed, and he never pulled himself together again."

Wellman says: "A good advocate should be a good actor. The most cautious cross-examiner will often elicit a damaging answer. Now is the time for the greatest self-control. If you show by your face, how the answer hurt,

you may lose his case by that one point alone. How often one sees the cross-examiner fairly staggared by such an answer. He pauses, perhaps blushes, and after he has allowed the answer to have its full effect, finally regains his self possession, but seldom his control of the witness. With the really experienced trial lawyer, such answer, instead of appearing to surprise or disconcert him, will seem to come as a matter of course, and will fall perfectly flat. He will proceed with the next question as if nothing had happened, or even perhaps give the witness an incredulous smile, as if to say, "Who do you suppose would believe that for a minute?" (Wellman pp. 13—14).

The same American writer says in his book "The Art of Cross-examination" :—"It is absurd to suppose that any witness who has sworn, positively to a certain set of facts, even if he has inadvertently stretched the truth, is going to be readily induced by a lawyer to alter them and acknowledge his mistake. People as a rule do not reflect upon their meagre opportunities of observing facts, and rarely suspect the frailty of their own powers of observation. They come to a Court, when summoned as witnesses, prepared to tell what they think they know ; and in the beginning they resent an attack upon their story as they would one upon their integrity.

"If the cross-examiner allows the witness to suspect, from his manner towards him at the start, that he distrusts his integrity, he will straighten himself in the witness chair and mentally defy him at once. If, on the other hand, the counsel's manner is courteous and conciliatory, the witness will soon lose the fear all witnesses have of the cross-examiner, and can almost imperceptibly be induced to enter into a discussion of his testimony in

a fair minded spirit which, if the cross-examiner is clever, will soon disclose the weak points in the testimony. The sympathies of the jury are invariably on the side of the witness, and they are quick to resent any discourtesy toward him. They are willing to admit his *mistakes*, if you can make them apparent, but are slow to believe him *guilty of perjury*. Alas, how often this is lost sight of in our daily court experiences! One is constantly brought face to face with lawyers who act as if they thought that every one who testifies against their side of the case is committing wilful perjury. No wonder they accomplish so little with their *cross*-examination! By their shouting, browbeating style they often confuse the wits of the witness, it is true; but they fail to discredit him with the jury. On the contrary, they elicit sympathy for the witness they are attacking, and little realise that their "vigorous cross-examination," at the end of which they sit down with evident self-satisfaction, has only served to close effectually the mind of at least one fair minded juryman against their side of the case, and as likely as not it has brought to light some important fact favourable to the other side which had been overlooked in the examination-in-chief." (Wellman, pp. 10-11).

Mr. Rufus Choate, the greatest advocate of America for all time, was a master of what is known as the "smiling" style. He had a kind word for every one and was extremely courteous when he performed his duties in Court. He never employed the roaring method and maintained a wonderfully calm temperament in the midst of the greatest provocation and yet achieved the greatest success. "He never aroused opposition on the part of the witness by attacking him, but disarmed him by the quiet

and courteous manner in which he pursued his examination. He was quite sure before giving him up, to expose the weak parts of his testimony or the bias, if any, which detracted from the confidence to be given it." (Neilson's Memories of Choate, quoted in Wellman, p. 12).

Among the American advocates, Rufus Choate was the foremost and was ranked as 'the first orator of his time in any quarter of the globe where the English language was spoken, or who was ever seen standing before a jury panel.' He was called the "wizard of the court-room." His biographer Parker says of him :—

"His cross-examination was a model. As was said when speaking of his conversations, he never assaulted a witness as if determined to browbeat him. He commented to me once on the cross-examinations of a certain eminent counsellor at our Bar with decided disapprobation. Said he: 'This man goes at a witness in such a way that he inevitably gets the jury all on the side of the witness. I do not', he added, 'think that is a good plan'. His own plan was far more wary, intelligent and circumspect. He had a profound knowledge of human nature, of the springs of human action, of the thoughts of human hearts. To get at these and make them patent to the jury, he would ask only a few telling questions—a very few questions but, generally every one of them was fired point-blank, and hit the mark. His motto was: '*Never cross-examine any more than is absolutely necessary. If you don't break your witness, he breaks you; for he only repeats over in stronger language to the jury his story.* Thus you only give him a second chance to tell his story to them and besides, by some random question you may draw out something damaging to your own case'. This is a frightful

liability. Except in occasional cases his cross-examinations were as short as his arguments were long. He treated every man who appeared like a fair and honest person on the stand, as if upon the presumption that he was a gentleman; and if a man appeared badly, he demolished him, but with the air of a surgeon performing a disagreeable amputation—as if he was profoundly sorry for the necessity. Few men, good or bad, ever cherished any resentment against Choate for his cross-examination of them. His whole style of address to the occupants of the witness stand was soothing, kind and assuring. When he came down heavily to crush a witness, it was with a calm, resolute decision, but no asperity—nothing curt, nothing tart.

"I never saw any witness get the better of him in an encounter or art or impudence. Very rarely, if ever, did he get the laugh of the Court-room fairly against him. He had all the adroitness of the Greek Pericles, of whom his adversary said, that he could throw Pericles, but when he did throw him he insisted upon it that he never was down, and he persuaded the very spectators to believe him. Occasionally Mr. Choate would catch a Tartar, as the phrase goes, in his cross-examination. In a District Court case, he was examining a government witness, a seaman who had turned States evidence against his comrade who had stolen monies from the ship on a distant shore. The witness stated that the other defendant, Mr. Choate's client, instigated the deed. 'Well' asked Choate, 'what did he say? Tell us how and what he spoke to you.' 'Why,' said the witness, 'he told us that there was a man in Boston named Choate, and he'd get us off if they caught us with the money in our boots.' Of course

a prodigious roar of mirth followed this truthful satire; but Choate sat still bolt upright, and perfectly imperturbable. His sallow face twisted its corrugations a little more deeply; but he uttered the next question calmly, coolly, and with absolute intrepidity of assurance." (Parker's Reminiscences of Choate.")

Sir James Scarlett (Lord Abinger) was one of the leading jury lawyers of his time and his reputation as a cross-examiner was second to none. His manner of cross-examination has been thus described:—

"In cross-examination he outstrips all that have ever appeared at the British Bar; not, perhaps, in one single quality—for while some have excelled him in strength and force, others have left him behind them in craft and wit. His superiority, however, as an accomplished cross-examiner as one combining the best qualities for the office, and making the best use of them at the best time and to the best effect—must on every hand be admitted. His brow is never clothed with terror, and his hand never aims to grasp the thunderbolt; but the gentlemanly ease, the polished courtsey, and the Christian urbanity and affection, with which he proceeds to the task, do infinitely more mischief to the testimony of witnesses who are striving to deceive, or upon whom he finds it expedient to fasten a suspicion. He has often thrown the most careful and cunning off their guard, by the very behaviour from which they inferred their security. Seldom has he discouraged a witness by harshness, and never by insult; and to put men upon the defensive by a hostile attitude, he has always considered unwise and unsafe. Hence he takes those he has to examine, as it were by the hand; makes them his friends, enters into familiar conversation

with them, encourages them to tell him what will best answer his purpose, and thus secures a victory without appearing to commence a conflict." (Quoted in Wrottesley, pp. 147-148).

Sir Henry Hawkins (Baron Brampton) was the most brilliant cross-examiner of modern advocates. He appeared in the celebrated Tichborne trial and his cross-examination of the witnesses was so perfect and effective that, as Clarke says, he established his reputation as "the foremost cross-examiner in the world."

Paul Brown's Golden Rules for Cross-examination.

I. Except in indifferent matters, never take your eye from that of the witness; this is a channel of communication from mind to mind, the loss of which nothing can compensate.

"Truth, falsehood, hatred, anger, scorn, despair,
And all the passions—all the soul is there."

II. Be not regardless, of the *voice* of the witness; next to the eye, this is perhaps the best interpreter of his mind. The very design to screen conscience from crime—the mental reservation of the witness—is often manifested in the tone or accent or emphasis of the voice. For instance, it becoming important to know that the witness was at the corner of Sixth and Chestnut Streets at a certain time, the question is asked, were you at the corner of Sixth and Chestnut Streets at six o'clock? A frank witness would answer—perhaps—I was near there. But a witness who had been there, desirous to conceal the fact, and to defeat your object, speaking to the letter than the spirit of the enquiry, answers No; although he may have been within a stone's throw of the place, or at the

very place within ten minutes of the time. The common answer of such a witness would be, I was not at the *corner* at *six o'clock.*

Emphasis upon both words plainly implies a mental evasion or equivocation, and gives rise with a skilful examiner to the question: At what hour were you at the corner, or at what place were you at six o'clock? And in nine instances out of ten it will appear, that the witness was at the place about the time, or at the time about the place. There is no scope for further illustration—but be watchful, I say, of the voice, and the principle may be easily applied.

III. Be mild with the mild—shrewd with the crafty; confiding with the honest—merciful to the young, the frail, or the fearful—rough to the ruffian, and a thunderbolt to the liar. But in all this, never be unmindful of your own dignity. Bring to bear all the powers of your mind, not that *you* shine, but *virtue* may triumph, and your *cause* may prosper.

IV. In a *criminal,* especially in a *capital* case, so long as your cause stands well, ask but few questions; and be certain never to ask *any* the answer to which, if against you, may destroy your client, unless you know the witness *perfectly* well, and know that his answer will be favourable *equally* well; or unless you be prepared with testimony to destroy him, if he play traitor to the truth and your expectations.

V. An equivocal question is almost as much to be avoided and condemned as an equivocal answer. Singleness of purpose, clearly expressed, is the best trait in the examination of witnesses, whether they be honest or the reverse. Falsehood is not detected by cunning, but by

the light of truth, or if by cunning, it is the cunning of the witness, and not of the counsel.

VI. If the witness determine to be witty or refractory with you, you had better settle that account with him at *first*, or its items will increase with the examination. Let him have an opportunity of satisfying himself either that he has mistaken *your* power, or his *own*. But in any result be careful that you do not lose your temper ; anger is always either the precursor or evidence of assured defeat in every intellectual conflict.

VII. Like a skilful chess-player, in every move, fix your mind upon the combinations and relations of the game—partial and temporary success may otherwise end in total and remediless defeat.

VIII. Never undervalue your adversary, but stand steadily upon your guard ; a random blow may be just as fatal as though it were directed by the most consummate skill ; the negligence of one often cures, and sometimes renders effective the blunders of another.

IX. Be respectful to the court and to the jury, kind to your colleague, civil to your antagonist ; but never sacrifice the slightest principle of duty to an overweening defence toward *either*.

Course of Cross-Examination.

The course of cross-examination in a case depends upon the plan which the advocate has formed for its conduct and on the estimate which he has made of the witness and the evidence let in. Serjeant Ballantyne says: "In order to attain success in this branch of advocacy it is necessary for counsel to form in his own mind an opinion upon the facts of the case and the charac-

ter and probable motives of a witness, before asking a question. This doubtless requires experience; and the success of his cross-examination must depend on the accuracy of the judgment he forms. Great discernment is needed to distinguish material from unimportant discrepancies, and never to dwell long upon immaterial matters; but if a witness intends to commit perjury, it is rarely useful to press him upon the salient points of the case, with which he has probably made himself thoroughly acquainted, but to seek for circumstances for which he would not be likely to prepare himself. And it ought above all things to be remembered by the advocate, that when he has succeeded in making a point he should leave it alone until his turn comes to address the jury upon it. If a dishonest witness has inadvertently made an admission injurious to himself, and, by the counsel's dwelling upon it, becomes aware of the effect, he will endeavour to shuffle out of it, and perhaps succeed in doing so." (Serjeant Ballantyne's Experiences).

Cox says: "But where shall you begin? What order shall you follow? Shall you carry him again through the narrative given in his examination-in-chief, or begin at the end of it and go backwards, or dodge him about, now here, now there, without method? Each of these plans has its advantages, and perhaps each should be adopted according to the special circumstances of the particular case. But you cannot determine which course to adopt unless you have some definite design in the questions you are about to put. A mere aimless, haphazard cross-examination is a fault every advocate should strenuously guard against."

Two American writers say that there are two kinds of

cross-examination, one *actual cross-examination* and the other *apparent cross-examination*. "An actual cross-examination goes into all the facts with determination and energy, is persistent and minute, while an apparent cross-examination is one that avoids the material points of the testimony, and is in reality an evasive examination designed to escape the dangers of an actual one. An apparent cross-examination keeps off on the edges and fringes of the case, while an actual cross-examination goes into the strongest parts. The one is employed where there is danger in attacking the strongholds, and a feint that will draw attention to other points is the object designed to be accomplished. The other is employed where there is a real assault upon the veracity of the witness as well as where it is the object of the examiner to show that the witness is mistaken, or to reveal his motives, show his ignorance, or bring out his statements for contradiction. Where there is danger of doing harm by examining on really important matters, and yet it is felt that there must be something like an examination, lest it be concluded by the jury that the testimony is confessedly too strong to be met, an apparent cross-examination is proper and expedient. Such an examination should keep away from the points of danger as much as possible, and yet it must not appear to be an idle or unmeaning procedure. (Work of the Advocate, pp. 288-289).

Questions should be framed in plain, simple and unambiguous language and in as short sentences as possible. If an witness belongs to an humbler walk of life, he cannot be expected to understand the language used by educated or cultured persons in their intercourse with each other. His vocabulary is quite different and

he best understands the patois current among men of his class. Great care should be taken when dealing with old persons, women, children or persons of weak intellect. It takes some time to make them understand the questions and they should always be treated kindly.

Questions should always be framed with some object in view. When a witness has spoken to positive statements, he has come prepared to stick to them at all events. It is futile to expect him to withdraw or modify them when questioned directly. He would on the other hand retaliate by emphasising them and giving details. The better plan is to make a flank attack and to tackle him by questions on matters which only bear indirectly upon the point in issue. Go to facts remotely connected with the main point,—things for which he has not come prepared with answers, probe the outlying circumstances and scrutinise his interest or bias. If you can thus lay hold of one fact which may serve as a connecting link, you may follow it with other questions which the witness will be constrained to answer in order to defend the position taken up. You can in this manner indirectly elict facts which go in your favour. A disinclination to answer, an evasion, a hesitancy or a fencing with you,—will sometimes be of more service than the reply which you have failed to obtain. When dealing with such a witness Harris says that "You must in other words go to the surrounding circumstances. The witness, however clever he may be, cannot prepare himself for questions he has no conception will be put to him." Cox says: "There is one kind of testimony which will sometimes baffle the utmost skill. It is the case of a witness who swears positively to some single fact, occurring when no

other person was present, or but one, now dead or far distant, whom therefore it is impossible to contradict, and equally difficult to involve in self-contradiction, because all the circumstances may be true, except the one which he has been called to prove. In such a case there remains only an appeal to the jury or judge to look with suspicion upon evidence so easily forged, so impossible to be disproved, and ask that its worth be tried by its intrinsic probabilities, showing, if you can, how improbable it is that such a statement should have been so made, or such a circumstance have occurred."

It is a mistake to pursue a cross-examination simply for the purpose of getting discrepant or contradictory statements on immaterial or trivial facts. In a case before Mr. Justice Stephen, the learned judge said: "I think it the greatest waste of time to ask questions in order to get contradictions with regard to conversations. There may be material points upon which it is important to cross-examine. If any two persons were to give an account of the conversation which the two learned counsel have been holding for the last hour and a quarter, there would be, I suspect, a vast difference indeed between their statements." (Harris' Advocacy p. 59). Cox says: "Beware that you do not fall into the fault, only too common with the inexperienced, of seizing upon small and unimportant discrepancies. Experience teaches us that there are few who can tell the same story twice in precisely the same way, but they will add or omit something, and even vary in the description of minute particulars. Indeed a verbatim recital of the same tale by a witness is usually taken as proof that he is repeating a lesson rather then narrating facts seen. A discrepancy to

be of any value discrediting a witness, must be in some particular which, according to common experience, a man is not likely to have observed so slightly as that he would give two different descriptions of it."

Cross-Examination—Liability to and Right of.

When a witness has been examined in chief, the other party has a right to cross-examine him. If a witness after being sworn is not examined in chief, the opposite party has also the right of cross-examination, unless the witness has been sworn under a mistake, whether on the part of the advocate or of the officer of the Court (*Wood* v. *Mackinson,* 2 M. & Rob. 273). To confer the right of cross-examination, it is not necessary that a witness should have been actually examined in chief ; for if he is a competent witness, intentionally called and sworn, the opposite party has, in strictness, a right of cross-examination, though the party calling him has declined to ask a single question (*Q.* v. *Ishan Dutta,* 6 B.L.R. Ap. 88 : 15 W.R. Cr. 34). It is the right of every litigant in a suit, unless he waives it, to have an opportunity of cross-examining witnesses whose testimony is to be used against him (*Chatoo Kurmi* v. *Rajaram,* 11 C.L.J. 124 F.B. p. 130). It is certainly implied by s. 138 I. E. A. that a party must have had an opportunity to cross-examine and it does not merely mean that a right to cross-examine a witness without an opportunity being offered for cross-examination is sufficient compliance with the requirements of law (*Moti Singh* v. *Dhanukdhari,* 73 I.C. 339).

In criminal cases specially in offences involving serious crimes, it is the duty of the prosecution to produce

all available witnesses to the occurrence (*Ramranjan* v. *E.*, 42 Cal. 422 ; see *ante* p. 246). In criminal cases, although the prosecution is not in strictness bound to call every witness named on the back of the indictment, it is usual to do so in order to afford the prisoner's counsel an opportunity to cross-examine them ; and if the prosecution will not call them, the judge in his discretion may (*R.* v. *Simmonds*, 1 C. & P. 84 ; *R.* v. *Bull*, 9 C. & P. 22—Phipson, p. 473).

The right of cross-examination belongs to an adverse party and parties who do not hold that position should not be allowed to take part in cross-examination (*Jarwa Bai* v. *Pitambar*, 24 C.L.J. 149).

A party cannot ordinarily cross-examine his own witness, nor can he impeach the credit of the witness called by him, except with the consent of the Court (ss. 154, 155, see *post*). If the witness is adverse or hostile, he may with the permission of the Court cross-examine him by putting leading questions and show that he has made inconsistent statements (see *post*).

A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness (s. 139 I. E. A. ; Or. 16, rr. 6, 15 and s. 94 Cr. P. Code). A witness whose examination has been stopped by the judge before any material question has been put, is not liable to cross-examination (*Creevy* v. *Carr*, 7 C. & P. 64).

Witnesses to character may be cross-examined (s. 140). According to the English practice it is not usual, except under special circumstances, to cross-examine witnesses simply called to speak to the character of the prisoner ;

but no rule of law forbids it (Taylor, s. 1429). Best says: "Witnesses to the character of parties are in general treated with great indulgence,—perhaps too much. Thus, it is not the practice of the bar to cross-examine such witnesses, unless there is some specific charge on which to found a cross-examination, or at least without giving notice of an intention to cross-examine them if they are put in the box." (Best, s. 262).

As to cross-examination of witnesses called by the Court or in regard to answers given to questions put by the Court, see *post*. As to cross-examination of a defendant by a co-defendant, see *post*.

Matter of Cross-examination.

Considerable latitude is allowed in cross-examination, and questions are not confined to facts elicited in exam-in-chief or to strictly relevant facts. The accused are entitled in cross-examination to elicit facts in support of their defence from the prosecution witnesses, wholly unconnected with the examination in chief (*Amritlal* v. *E.*, 42 C. 957). Questions irrelevant in exmn-in-chief, may be relevant in cross-examination. The cross-examiner may undertake to show at some subsequent stage that questions apparently irrelevant are really relevant (s. 136). Sec. 138 says that both ex-in-chief and cross-examination must relate to *relevant* facts. "Relevant facts" in cross-examination must necessarily have a wider meaning than the term when applied to exmn-in-chief. For instance, facts though otherwise irrelevant may involve questions affecting the credit of a witness and such questions are permissible in cross-examination (see generally ss. 146-153). But questions manifestly irrelevant or questions not in-

tended to contradict or qualify the statements in exam-in-chief, or which do not impeach the credit of a witness, are not allowed in cross-examination. There is no rule of law which renders *hearsay* evidence more admissable in cross-examination than in exmn-in-chief (*Ganauri* v. *Q. E.*, 16 C. 206, 211). The moment a witness commences giving hearsay evidence, he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the jury to reject the hearsay evidence and to decide on the legal evidence alone (*Q.* v. *Pittamber*, 7 W.R. Cr. 25). A witness cannot be asked whether a third person had admitted that he and not the party charged was the person liable, for such evidence would be hearsay (*Watts* v. *Lyons*, 6 M. & G. 1047) ; but he may be asked whether such third person is the person to whom credit was given, or who was dealt with as the party primarily liable, and it seems that he may be asked such questions as the foregoing, in order to test his memory or credibility (*Hollingham* v. *Head*, 4 C.B., N.S. 388 ; Powell, p. 534).

The cross-examination is not limited to the matters upon which the witness has already been examined in chief, but extends to the whole case. Consequently, if a plaintiff calls a witness to prove the simplest fact connected with the case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish if he can, his entire defence ; and this doctrine has been carried so far that even a person who is the substantial party to the cause, called by his adversary for the sake of formal proof only, is thereby made a witness for all purposes, and may be cross-examined as to the whole case. In America, however, a party has no right to cross-examine any witness except

as to circumstances connected with matter stated in his direct examination ; and if he wishes to examine him respecting other matters, must do so by making him his own witness, and by calling him, as such in the subsequent progress of the cause (Tay. s. 1432). See also *Q.* v. *Ishan Dutt,* 6 B.L.R. Ap. 88. *In re Woodfine,* 40 L.J. Ch. 832 where the issues on a claim and counter-claim were separately tried, Fry, J. directed the defendant to recall plaintiff as his own witness and not to cross-examine him on the matters raised by the defendant by the counter-claim.

The rule which confines evidence to the points in issue, and excludes all proof of such collateral facts as afford no reasonable inference with respect to the principal matters in dispute, is not usually applied in cross-examinations with the same strictness as in examination-in-chief ; but great latitude of interrogation is sometimes permitted, when, from the temper or conduct of the witness, or from other circumstances, such course seems essential to the discovery of truth ; or where the cross-examiner will undertake to show, at some subsequent stage of the trial, by other evidence, the relevancy of the question put (see s. 136). On this head it is difficult to lay down, or rather to apply precise general rule. (Tay. s. 1434).

Witnesses to character may be cross-examined (s. 140) *Leading questions* may be asked in cross-examination (s. 143). As to cross-examination in regard to *previous statements* in writing with a view to contradict, see s. 145. As to impeaching credit by previous *oral* statements, see s. 153 (3). As to additional questions lawful in cross-examination see s. 146. A witness is not always compellable to answer all questions in cross-examination (ss. 147,

148). He may be cross-examined and contradicted on all matters directly relevant to the issue. As to matters relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, though the witness may be cross-examined, he cannot be contradicted except in two cases (see s. 153). As to the way in which the credit of a witness may be impeached in cross-examination, see s. 155. Court may permit a party to cross-examine his own witness, if he turns hostile (s. 154). As to evidence relating to matters in writing see s. 144. As to cross-examination of a witness called to produce a document, see s. 139. Court may exclude indecent, scandalous or annoying questions. (ss. 151, 152).

Questions not permissible in cross-examination—Unfair questions.

Questions which assume facts to have been proved, which have not been proved, or that particular answers have been given which have not been given, will not at any time be permitted (Tay, s. 1431). A question which assumes a fact that may be in controversy is leading when put in direct examination, because it affords the willing witness a suggestion of fact which he might otherwise not have stated to the same effect. Similarly such a question may be improper on cross-examinations, because it may by implication put into the mouth of an unwilling witness, a statement of fact which he never intended to make and thus incorrectly attribute to him testimony which is not his (Wigmore, s. 780).

Every witness must be allowed to have fair play. It is unworthy of an advocate to attempt to corner a witness by putting a question which involves an assump-

tion that he or another witness has made a statement that has not been made. Very often witnesses are puzzled by questions in which assumptions of facts are covertly made, lest the trick be detected when questions are direct. Under this head comes questions like these: 'When did you cease beating your wife,' 'When did you cease to be enemy of the plaintiff'? 'When did you stop communicating with him'? 'Do you go there still'? 'Does he bear ill-feeling even now'? 'When did you sell your interest in the claim'? 'When did you retire from the conspiracy'? The authors of the Port Royal Logic give this example: "In the same way, if, knowing the probity of a judge, any one should ask me if he sold justice still, I could not reply by simply saying 'no,' since the 'no' would signify that he did not sell it now, but would leave it to be inferred, at the same time, that I allowed that he had formerly sold it."

Another unfair practice is to demand a categorical answer—'Yes' or 'No'—by putting a question which is really composed of several parts admitting of different answers. The authors of the 'Work of the Avocate' say: "This is an old fallacy, and ought to be so well known as to be readily exposed, but it does, nevertheless, yet do no little mischief. Many a witness has been sorely puzzled by being required to answer "yes" or "no" to a question which in form is single, but in fact double. Thus a witness is asked: "You hurt yourself by jumping off a train running forty miles an hour? "Or, he is asked: "You paid the money to the plaintiff's agent?" Or, again, he is asked: "You were the plaintiff's partner in this venture?" If the one to whom are addressed questions so plainly double were cool and col-

lected, doubtless he would not be misled; but few witnesses can be cool and collected while under cross-examination, and they are often betrayed into error. A witness who has an advocate demanding of him, "answer yes, or no, sir," is not in a condition to clearly perceive the unfairness of the question aswed him. Nor are the questions ordinarily asked of witness so plainly double as those we have given by way of illustration, for many are so adroitly constructed as to deceive keen thinkers. The remedy for this evil is that proposed by Aristotle. "Several questions," he says, "should be at once decomposed into their several parts. Only a single question admits of a single answer." (Work of the Advocate, pp. 334, 335).

It is not infrequently found that a witness is embarrassed by putting questions as to the effect of evidence given by himself or other witnesses. Such questions do not serve any useful purpose. A witness should only state facts within his knowledge and he should not be drawn into a controversy and allowed to venture his opinion on the effect of evidence. This matter formed the subject of comment in the recent case of *R.* v. *Baldwin.* The Law Journal, remarked: "In the case of *Rex* v. *Baldwin* reported in the *Times* newspaper of Tuesday last, the Court of Criminal Appeal addressed some elementary, but much-needed remarks to the world at large as to the inaptitude, to say the least, of a particular type of question very frequently put to witnesses these days. The reference was to the interrogation which invites a witness to state, facts not within his cognizance, but the effect of evidence already given, whether by himself or by others; and a typical form of it was quoted: "Is your evidence to

be taken to suggest. . . . . ?" Apart from the special class of witnesses known as "expert" it is, of course, a first and universally recognised rule that the function of the witness is to state facts within his knowledge ; it is no more his function to review his own or anybody else's evidence than it is to comment upon the law applicable to the case." (*Law Journal*, London, p. 260, March 21, 1925).

Incautious or reckless cross-examination—Its dangers.

It has been seen that the object of cross-examination is to destroy, qualify or weaken the case of the adversary and to establish the party's own case with the evidence of the opponent's witnesses. Questions should always be framed with this object in view. Random questions or fishing questions should be avoided, for an incautious or reckless cross-examination, may let in facts which were not brought out or which would be inadmissible in exam-in-chief. The reckless asking of questions, in the hope of getting some favourable answer, might often produce the opposite result. Mr. Baron Alderson once told a counsel, "Mr.—, you seem to think that the art of cross-examination is to examine crossly."

Questions should not be asked for question's sake. If the witness has said nothing injurious to your client's case, the better course would be not to disturb or provoke him by useless cross-examination, on the off chance of getting favourable answers on another point. The answers may recoil on you. It is a matter of common experience that young or unskilful lawyers always labour under the idea, that it is their duty to cross-examine every witness who is sworn. They seem to think that if they do not

cross-examine at length, every witness, it will be interpreted by their clients as want of competence. Such aimless and unnecessary cross-examination generally elicits answers which go against the cross-examiner's client, and results in the development of theories which the other side never thought of before. This would never have happened if silence had been observed.

As the witness is being examined in chief, the advocate on the opposite side should be all attention to each question and answer and take necessary notes. He must enter into the purpose of each question and ascertain its bearing on the point in issue. He should then ascertain whether he has said anything which goes materially against his case or whether there is any likelihood of his being able to weaken his testimony. He should take stock of all the circumstances and decide whether any cross-examination is at all necessary and if so, on which points.

"Never cross-examine any more than is absolutely necessary" is a sound rule. When you are not sure that the answers will be favourable to you, or you have no idea one way or the other, it is better to ask too little than too much. No doubt occasions will arise when perilous questions must be risked, but you must look around before the leap is taken. Sometimes persistency of a client or adviser prompts an advocate to ask a question with disastrous consequences to his case. An advocate should not on any account surrender his own judgment to such importunities. If he is decidedly of opinion that the question is risky and there is more chance of its causing injury than good, he must not give away. Serjeant Ballantyne in his "Experiences" quotes an instance in the

trial of a prisoner on the charge of homicide, where a once famous English barrister had been induced by the insistence of the prisoner's attorney, although against his own judgment, to ask a question on cross-examination, the answer to which convicted his client. Upon receiving the answer he turned to the attorney who had advised him to ask it, and said emphasising each word, "Go home ; cut your throat ; and when you meet your client in hell, beg his pardon."

When the evidence in the exam-in-chief is clear and unimpeachable, it is not advisable to attempt to mend matters by cross-examining directly on the point. Such a case will not infrequently make your opponent's case more strong. The witness will only get a chance of repeating his story with emphasis and if the transaction deposed to really occurred, constant interrogation will have the effect of reminding him of many details which he had omitted or forgotten.

Injudicious attacks upon the credit of witnesses, at the dictation of a party, do more harm than good. A party, is in most cases actuated by bitter personal feelings against his opponent, and he is always anxious to sieze upon the opportunity of heaping insults on him or his witnesses in the box, irrespective of the result of his case. If unfounded suggestions are thrown out indiscriminately and incidents that took place decades ago and do not affect the credibility of the witness on the matter on which he testifies, are raked up, they irritate the Judge and make the jury unsympathetic.

"If cross-examination is a powerful engine, it is likewise an extremely dangerous one, very apt to recoil even on those who know how to use it. The young advocate

should reflect that if the transaction to which a witness speaks really occurred, so constant is the operation of the natural sanction of truth that he is almost sure to recollect every *material* circumstance by which it was accompanied ; and the more his memory is probed on the subject, the more of the circumstances will come to light, thus corroborating instead of shaking his testimony. And forgetfulness on the part of witnesses, of immaterial circumstances not likely to attract attention, or even slight discrepancies in their testimonies respecting them, so far from impeaching their credit, often rather confirms it. Nothing can be more suspicious than a long story, told by a number of witnesses who agree down to the minutest details. Hence it is a well-known rule that a cross-examining advocate ought not, in general, to ask questions the answer to which, if unfavourable will be conclusive against him ; as, for instance, in a case turning on identity, whether the witness is sure, or will swear, that the accused is that man of whom he is speaking. The judicious course is to question him as to surrounding or even remote matters ; his answers respecting which may show that, in the testimony he gave in the first instance, he either spoke falsely or was mistaken. Under certain circumstances, however, perilous questions must be risked ; especially where a favourable answer would be very advantageous and things already press so hard against the cause of the cross-examining advocate, that it could scarcely be injured by an unfavourable one." (Best. s. 660).

The advice of so distinguished an authority as Cox, is worth quoting: "Let it be a rule with you never to cross-examine unless you have some distinct object to

gain by it. Far better be mute through the whole trial, dismissing every witness without any word, than, for the sake of mere appearances, to ply them with questions not the result of a purpose. You will not fall in the estimation of those on whom your fortunes will depend ; but the contrary. The attorneys well know that in legal conflicts, even more than in military ones, discretion is the better part of valour ; they will not mistake the motive of your silence, but they will commend the prudence whose wisdom is proved by the results.

'*Your first resolve will therefore be, whether you will cross-examine at all.* It is impossible to prescribe any rule to guide you in this ; so much must depend upon the particular circumstances of each case. You must rely upon your own sagacity, on a hasty review of what the witness has said—how his testimony has affected your case, and what probability there is of your weakening what he has said. If he has said nothing material, usually the safer course is to let him go without any question, unless indeed you are instructed that he can give some testimony in your favour, or damaging to the party who has called him, and then you should proceed to draw that out of him. But unless so instructed, you should not, on some mere vague suspicions of your own, or in hope of hitting a blot somewhere by accident, incur the hazard of eliciting something damaging to you—a result to be seen every day in our Courts. So, as a general rule, it is dangerous to cross-examine witnesses called for mere formal proofs, as to prove signatures, attestations, copies, and such like. Still, such witnesses are not to be immediately dismissed, for you should first consider if there be any similar parts of your case which they may prove, so

as to save a witness to you and then you should carefully confine yourself to the purpose for which you have detained them." (Cox's Advocate).

Omission to cross-examine on certain points.

The skilful cross-examiner must hear the statements in examination-in-chief with attention, and when his turn comes, he should interrogate the witness on the points that go against him. If he omits or ignores them, they may be taken as a sort of admission, and the other side will naturally assert that they go unchallenged.

Generally speaking, a party should put to each of his opponent's witnesses in turn, so much of his case as concerns that particular witness or in which he had a share. Thus, if a witness speaks about a conversation, the cross-examining lawyer must indicate by his examination how much of the witness's version of it he accepts and how much he disputes. If he asks no questions, he will be taken to accept the witness's account (*Flanagan* v.*Fahy*, 2 I.R. 361, 388-389; see Odger's Pleading, 6th Ed. p. 304; Powell, 9th Ed. p. 531; Phipson, 6th Ed. p. 475).

Right to cross-examine co-accused's and co-defendant's witnesses.

When two or more persons are tried together on the same indictment and are separately defended, any witness called by one of them may be cross-examined on behalf of others, if he gives any testimony to incriminate them (*R.* v. *Burdett*, 1855, Dears C.C. 431) and where two prisoners are tried together, and one gives evidence affecting the other, the other prisoner has a right of cross-examining him (*R.* v. *Hawden*, 1902, 1 K.B. 882). The

counsel, too, for the other prisoners are entitled in such a case to rely upon the evidence (*R.* v. *Burdett, supra*). So, in *Lord* v. *Colvin*, 1855, 24 L.J. Ch. 517, Kindersley, V.C., after consulting all the equity judges held that, before an examiner in chancery, one defendant might cross-examine another defendant's witness (Taylor, s. 1430 and f.n.). Where several prisoners are tried on the same indictment and separately defended, any witness whether a co-defendant or not, called by one may be cross-examined by the others against whom they have incriminatory evidence, or by the Crown to elicit such evidence ; and the parties against whom such evidence is given have a right to reply thereon (*R.* v. *Hawden*, 1902, 1 K.B. 882 ; *R.* v. *Paul*, 1920, W.N. 121 ; Phipson, p. 474). No special provision is made in the Evidence Act for the cross-examination of the co-accused's or co-defendant's witnesses. But the procedure to be adopted might be regulated by the well-known rule that no evidence should be received against one who had no opportunity of testing it by cross-examination. It would be unjust and unsafe not to allow a co-accused to cross-examine witnesses called by one whose case was adverse to his.

In *Ram Chand* v. *Hanif Sheikh*, 21 C. 401, Trevelyan and Rampini, JJ., observed: "We think that there might be many cases of failure of justice if a co-accused were not allowed to cross-examine witnesses called by a person whose case was adverse to his, for the effect might be, practically that a Court might act upon evidence, which was not subject to cross-examination. The Evidence Act gives a right to cross-examine witnesses

called by the adverse party." But see, *Q.* v. *Saroop*, 12 W.R. Cr. 75, a case decided before the passing of the Evidence Act.

The admission of one co-plaintiff or co-defendant is not receivable against another, merely by virtue of his position as a co-party in the litigation. Where several persons are jointly interested in the subject matter of the suit, an admission of any one of them is receivable against the others, provided the admission relates to the subject matter in dispute, and be made by him in his character of a person jointly interested with the party against whom it is sought to be used. The requirement of the identity of legal interest is of fundamental importance (see *Amber Ali* v. *Lutfe Ali*, 45 Cal. 150 and s. 18 I.E.A.). If the interest of one defendant is quite adverse to that of the other, and is separately represented there is no reason why cross-examination should not be allowed. So, it has been held that one defendant whose interests are separately represented may cross-examine another with a view to discrediting evidence which he has given in favour of the plaintiff (*Narasimma* v. *Kistnama*, 1 M.H.C. 456). Where some of the defendants support the plaintiff's case and others oppose it, those who support the plaintiff's case should be ordered to cross-examine plaintiff's witness first, if they desire and to call their evidence and address the Court before the defendants who oppose the plaintiffs case do so (*Motiram Marwari* v. *Lalit Mohan*, 58 I.C. 238).

Insulting observation during cross-examination.

Questions should not be accompanied by insulting or annoying observations and imputations, although counsel

is at liberty to make comments at the time of argument. In *Hardy's Trial* (24 How. St. Tr. 754) Mr. Erskine during his cross-examination relating to the proceedings of an alleged seditious meeting asked: "Then you were never at any of those meetings but in the character of a spy" "As you call it so, I will take it so." "If you were not there as a spy, take any title you choose for yourself and I will give you that." Eyre, L.C.J., observed: "There should be no name given to a witness on his examination. He states what he went for, and in making observations on the evidence, you may give it any appellation you please." On a similar occasion, he again said "I think, it is so clear that the questions that are to be put are not to be loaded with all the observations that arise upon all the previous parts of the case; they tend so to distract the attention of every body, they load us in point of time so much; and that that is not the time for observation upon the character and situation of a witness is so apparent that as a rule of evidence it ought never to be departed from."

Running comments should not also be made on the value or effect of a witness's testimony or his character during the examination. They should be reserved for the address. Nor should the cross-examiner enter into any discussion with the witness on any point by raising purely hypothetical questions.

Indecent or offensive questions.

The Court may forbid any questions as indecent or scandalous, although they may have some bearing on the questions before the Court, unless they relate to facts in

issue or facts relevant to the issue (s. 151). The Court shall forbid questions intended to insult or annoy or which appears to be needlessly offensive in form (s. 152). Indecent and scandalous questions may be put either to shake the credit of a witness or as relating to the facts in issue, or to determine whether or not a fact in issue existed. If they are put merely to shake the credit, the Court has complete dominion over them and may forbid them even though they may have some bearing on the question before the Court. But if they relate to facts in issue or are necessary to determine whether the fact in issue existed, the Court has no jurisdiction to forbid them (*Mahomed Mian* v. *E.*, 52 I.C. 54 ; *Rozario* v. *Ingles*, 18 Bom. 468 p. 470). During the examination of one of the defendants by the plaintiff, she was asked whether she was made pregnant by a certain person. If the plaintiff's case is that she did not inherit her husband's property by reason of her unchastity during his life time, then the question would be relevant. If, however, it was asked for impeaching her credit as a witness, the Court will have to consider the provisions of ss. 146 and 148-152 (*Subala* v. *Indra*, 65 I.C. 692). When a question in cross-examination reflects not on the witness but a third party, s. 150 which must be referred back to s. 146 can have no application (*Peary Mohan* v. *Weston*, 16 C.W.N. 145).

Leading questions.

Leading question is any question suggesting the answer which the person putting it wishes or expects to receive (s. 141 Evidence Act). A leading question, says Taylor, is one which suggests to the witness the answer desired, or which embodying a material fact, admits of a conclusive answer by a simple negative or affirmative

(Taylor, s. 1404). Bentham defines a leading question to be one when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you not reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him? It is clear that under this form, every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions to be put to him; and the examiner, while he pretends ignorance and is asking for information is in reality giving instead of receiving it (Bentham's Rationale of Judicial Ev.).

A question is objectionable as leading when it suggests the *answer*, not when it merely directs the attention of the witness to the *subject* respecting which he is questioned (*Nichols* v. *Dowding*, 1 Stark, 81; Best, s. 641).

Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have in its opinion, been already sufficiently proved (s. 142 Evidence Act).

Leading questions may be asked in cross-examination (s. 143).

The general rule is that leading questions should not be asked in examination-in-chief or re-examination. It is the business of a lawyer to help the Court in the administration of justice by eliciting facts within the knowledge of his witness and not to prompt him. The reason for

exclusion of leading questions in examination-in-chief or re-examination is simple. A witness has always a natural bias in favour of the party calling him and he will therefore be too ready to say "yes" or "no" as soon as he realises from the form of the questions that the one or the other answer is desired from him. Another reason as Best says, is "that the party calling an witness has an advantage over his adversary, in knowing beforehand what the witness will prove, or at least is expected to prove ; and that consequently, if he were allowed to lead, he might interrogate in such a manner as to extract only so much of the knowledge of the witness as would be favourable to his side, or even put a false gloss upon the whole (Best, s. 641).

Sec. 142 says that *leading questions must not, if objected to by the adverse party, be asked in ex.-in-chief.* The objection should be taken at the earliest opportunity *i.e.*, when the question is put or in course of being put. If the objection is not taken at the proper time, the answer will be taken down by the Judge and the mischief may not be remedied. If the opposite party's objection is well founded and the Court in its discretion permits the question to be put, by disallowing the objection, it is advisable to ask the Court to note the question so that the effect of the evidence may be judged by the higher Court, should there be any appeal, or it may be shown afterwards to the same court that the force of the evidence has been weakened by the question in leading form. Where questions are objected to and allowed by the Court, the Judge shall take down the question, the answer, the objection &c. (Or. 18, r. 12 C. P. Code). The proper way to exclude

evidence obtained by leading questions is to disallow the questions (15 W.R. Cr. 23, p. 24).

If however, the lawyer on the opposite side fails in his duty to object to leading questions and answers are elicited by such question, it is no triumph of the examiner, as the effect of such evidence must necessarily be very weak.

Lord Ellenborough said: "I wish that objections to questions as leading, might be a little better considered before they are made. It is necessary, to a certain extent, to lead the mind of the witness to the subject of inquiry. If questions are asked, to which the answer "Yes" or "No" would be conclusive, they would certainly be objectionable, but in general no objections are more frivolous than those which are made to questions as leading ones" (*Nichols* v. *Dowding*, 1815, 1 Stark. 81).

In practice leading questions are often allowed to pass without objection, sometimes by express and sometimes by tacit consent. This latter occurs when the questions relate to matters which, though strictly speaking in issue, the examining counsel is aware are not meant to be contested by the other side: or when the opposing counsel does not think it worth his while to object. On the other hand, however, very unfounded objections are constantly taken on this ground (Best s. 641).

Court may in its discretion permit leading questions in ex.-in-chief.

S. 142 says that leading questions must not be asked, if objected to, *except with the permission of the Court.* As "the objection to leading questions is not that they are absolutely illegal, but only that they are unfair" (*per*

Petheram, C.J., in *R.* v. *Abdullah*, 7 A. 385, 397 ; see also *Exp. Bottomley*, 1909, 2 K.B. 14, 16), the Court may in its discretion allow leading questions to be put in proper cases. The following are *exceptions to the general rule.*—

(i) Introductory or undisputed matter.

The Court shall permit leading questions as to matters which are introductory or undisputed or which has been sufficiently proved (s. 142, second para.) The general rule does not apply to the part of the examination which is introductory to that which is material. If, indeed, it were not allowed to approach the points in issue by such questions, examination would be most inconveniently protracted. To abridge the proceeding, and to bring the witness as soon as possible to the material points on which he is to speak, the counsel may lead him on that point and may recapitulate to him the acknowledged facts of the case, which have been already established. (Taylor, s. 1404). It is therefore not only permissible but proper to lead on matters introductory or undisputed.

Cox says: "But first observe that the rule against leading questions is properly applicable only to such questions as relate to the matter at issue. Whatever some priggish opponent may suggest, it is permitted to you—and the Judge will encourage you in the practice—to lead the witness directly up to the point in issue. It saves time and clears the case, and if you narrowly observe experienced advocates, you will find that they always adopt this course. For instance instead of putting the introductory questions, 'Where do you live?' 'What are you?' and so forth, you should unless there be some special reason to the contrary, directly put the leading

questions, 'Are you a banker carrying on business in Lombard Street?' and so on, until you approach the questionable matter, when, of course, you will proceed to conduct the examination according to the strict rule."

(ii) Identification.

The attention of a witness may be directly pointed to some persons or things, for the purpose of identifying them. For instance, it is usual to ask a witness if the accused is the person whom he refers to. This form of question is obviously unsatisfactory, and the testimony does not carry much weight. "In the present day, it is considered the proper method for counsel merely to ask. Do you see the person in Court? and leave the witness to identify the prisoner (Powell, 9th Ed., 528-529). It is advisable not to lead under such circumstances. Although it would be perfectly regular to point to the accused and ask a witness if that is the person to whom his evidence relates, yet if the witness can unassisted, single out the accused, his testimony will have more weight (Best, s. 643).

(iii) Contradiction.

A witness may be asked leading questions in order to contradict statements made by another witness *e.g.* if A has said that B told him so and so ; B may be asked, Did you ever say that to A?

Where one witness is called to contradict another as to expression used by the latter, but which he denies having used, he may be asked directly,—Did the other witness use such expressions? The authorities are not quite agreed as to the reason of exception, and strongly contend that the memory of the second witness ought first

to be exhausted by his being asked what the other said on the occasion in question. (Best, s. 642). The witness may be asked not merely what was said, but whether the particular expressions were used, since otherwise a contradiction might never be arrived at (*Edmonds* v. *Walter*, 3 Stark 7 ; *Courteen* v. *Touse*, 1 Camp. 43). Where however the conversation is not proved merely for the purpose of contradiction, the latter question is improper. (*Hallet v. Cousens*, 2 M. & R. 238—Phipson, p. 469).

(iv) Helping memory.

The rule will be relaxed where the inability of a witness to answer question put in the regular way obviously arises from defective memory (Best, s. 642). Thus, where a witness, has apparently forgotten a thing, and all attempts to recall to his mind by ordinary question have failed, his attention may be drawn to it by a question in leading form. The object is to refresh his memory by drawing his attention to a particular topic without suggesting the answer. Where a witness stated that he was unable to remember the names of the members of a firm, but that he could recognise and identify them if they were read to him. Lord Ellenborough allowed it to be done (*Acerro* v. *Petroni*, 1 Stark 100).

The Court will, too sometimes allow, a pointed or leading question to be put to a witness of tender years whose attention cannot otherwise be called to the matter under investigation (Taylor, s. 1405).

Cox says: "Frequently it will occur that you will have need to call the attention of the witness to something he may have forgotten—as thus: Suppose that you were examining as to some conversation. The witness has narrated the greater portion of it, but he has omitted a

passage which is of importance to you. We know that, in fact, with all of us, in our calmest moments, it is difficult to repeat perfectly the whole of what was said at a certain interview, and if it had been a long one probably we might repeat it half-a-dozen times, and each time omit a different portion of it, although in either case the omitted part would be instantly recalled to our memories if we were asked, 'Did he not also say so-and-so?' or, 'Was not something said about so-and-so?' But this sort of reminiscent question you are not permitted to put to a witness, because it would be a leading question, although he is far more likely, in his agitation, to forget that he had not repeated the whole than we should be in our calmest moments. In vain you ask him, 'Did anything more pass between you?' 'Was nothing more said?' 'Have you stated all that occurred?' He does not in fact remember precisely what he has stated of it, or the portion you desire to obtain has escaped his memory for the moment. It would flash upon him instantly if it were to be repeated, or even to be half uttered. But you may not help him so; and then there arises a perplexity which every advocate must often have experienced—in what manner can this be recalled without leading. As each case must depend upon its circumstances, it is impossible to lay down any rule to help you, or even to hint at forms of suggestion. But one method we may name, as having proved efficacious when others have failed, and that is, to make the witness repeat his account of the interview, or whatever it may be, then it will not unfrequently happen, as we have already observed, that he will remember and repeat the passage you require, and omit something else which he had previously stated. But this, of course,

matters not ; your object has been gained, and your adversary may take what advantage he can of the difference in the statements." (Cox's Advocate).

(v) Hostile Witness.

If a witness called by a party appear to be hostile or interested for the other party, the Court may in its discretion allow leading questions to be put, *i.e.*, allow him to be cross-examined (s. 154 Evidence Act ; see *post* p. 409).

(vi) Complicated Matter.

The rule will be relaxed, where the inability of a witness to answer questions put in the regular way arises from the complicated nature of the matter as to which he is interrogated (Best, s. 642).

The above six exceptions must not be taken as exhaustive. The court has always a discretion in the matter, and it will allow leading questions to be put whenever it considers necessary in the interests of justice. Indeed, the Judge has, says Taylor, discretionary power, not controllable by the Court of appeal, of relaxing the general rule, whenever and under whatever circumstances, to whatever extent, he may think fit, though the power should only be exercised so far as the purposes of justice plainly require (Taylor, s. 1405).

It is the Court, and not the counsel for the Crown, who can determine, whether leading questions should be permitted, and the responsibility of the permission rests with the Court (*Barindra* v. *E.*, 37 Cal. 467).

Leading questions in cross-examination.

The reasons for excluding leading questions in exam.-in-chief disappear when the witness is under cross-

examination, as he is generally adverse to the party cross-examining. So, s. 143 enacts that "leading questions may be asked in cross-examination." This rule is not unrestricted in its scope. When the witness under cross-examination is distinctly favourable to the opponent of the party who called him, the Court will sometimes refuse to allow the cross-examiner to lead his adversary's witness. In Hardy's trial (24 How. St. Tr. p. 659), a prosecution witness, was asked a leading question by the defence counsel on his evincing a favourable disposition towards the prisoner, Buller, J., disallowed the question saying: "You may lead a witness upon cross-examination to bring him directly to the point as to the answer; but you cannot go to the length of putting into the witness's mouth the very words which he is to echo back again." But in *Parkin* v. *Moon*, 1836, 7 C. & P. 408, Alderson, B. said: "I apprehend you may put a leading question to an unwilling witness, on the examination-in-chief, at the discretion of the judge; but you may put a leading question in cross-examination, whether a witness be unwilling or not." Yet, when a vehement desire is betrayed to serve the interrogator, it is certainly improper and greatly lessens the value of the evidence, to put the very words into the mouth of the witness which he is expected to echo back; (*R.* v. *Hardy*, 1794, 24 St. Tr. 755; Phip., p. 476; Tay. s. 1431; Powell, p. 532; Steph. art. 128). There is no doubt that when the witness cross-examined changes side and turns favourable to the party cross-examining him, it would be weakening his evidence if advantage it taken of the situation and leading questions suggesting the very answers required are put to him.

Leading questions in such a case are neither proper nor just, and the Court should not allow them.

Cross-examining one's own witness—Hostile witness.

It has been seen that leading questions are not allowed in examination-in-chief, *i.e.*, they are not allowed to be put to a party's own witness. The rule must of necessity be relaxed when the witness by his conduct *i.e.*, attitude, demeanour, &c. or unwillingness to answer, shows that he is adverse to the party calling him. The Court in such a case, *may* in its discretion, permit a party to put any questions to him which might be put in cross-examination by the adverse party (s. 154) *i.e.*, may permit him to lead or cross-examine. He may also with the consent of the Court under s. 155 impeach the witness's credit by giving independent evidence as to his untrustworthiness. The exact meaning of the word 'adverse' has been the subject of many conflicting decisions in England. Some judges took the view that 'adverse' has the sense of exhibiting hostile feeling, while others were of opinion that a witness is adverse also when his testimony is unfavourable to the party calling him. In *Dear* v. *Knight*, 1859, 1 F. & F. 433 Earle, J., apparently regarded a witness as adverse simply because he made a statement contrary to what he was called to prove. See also *Pound* v. *Wilson*, 4 F. & F. 301 ; *Anstell* v. *Alexander*, 16 L.T. 830 ; *R.* v. *Little*, 15 Cox. 319 ; *R.* v. *Williams*, 29 T.L.R. 128. In *Coles* v. *Coles and Brown*, 1866, L.R. 1 P. & D. 71, Sir J. P. Wilde said : "An *adverse* witness is one who does not give the evidence which the party calling him wished to give. A *hostile* witness is a witness who, from the manner in which he gives his evidence,

shows that he is not desirous of telling the truth to the Court." In *Greenough* v. *Eccles*, 1859, 5 C.B. (N.S.) 786, (Williams and Willes, JJ., dubit. Cockburn, C. J.) it has been laid down that the word 'adverse' means 'hostile' and not merely 'unfavourable.' It is conceived that in view of the conflict in regard to the meaning of these words, the draftsman of the Evidence Act refrained from using any of the words 'hostile,' 'unfavourable' or 'adverse' and left the matter entirely in the discretion of the Court. There is nothing in s. 154 as to declaring a witness hostile, but it provides that the Court *may, in its discretion* permit a person who calls a witness to put any questions to him which might be put in cross-examination (*Baikuntha* v. *Prasannamoyi*, 27 C.W.N. 797 P.C.: 72 I.C. 286). If exhibition of hostile *animus* were the sole test of declaring a witness adverse, the object would be frustrated in many instances. A shrewd and composed witness might by maintaining a perfectly calm bearing, conceal his real sentiments or hostile attitude and give unfavourable evidence and make statements contrary to what the party calling him wished him to say. Merely giving adverse testimony cannot also be enough to declare a witness adverse. The Court has by s. 154 been given a very wide discretion and is at liberty to allow a party to cross-examine his own witness, (1) when his temper, attitude demeanour etc., in the witness box shows a distinctly hostile feeling towards the party calling him, or (2) when concealing his true sentiments he does not exhibit any hostile feeling, but makes statements contrary to what he was called to prove; or by his manner of giving evidence shows that he is not desirous of telling the truth to the Court (see *ante* definition of Wilde, J.

O. which was approved in *Luchiram* v. *Radhacharan*, 49 Cal. 93). The mere fact that a witness tells a different story from that told by him before, does not necessarily make him hostile. A witness is hostile, if he tries to defeat the party's case by suppressing the truth (*Kalachand* v. *K. E.*, 13 Cal. 53, 56; *E.* v. *Satyendra*, 37 C.L.J. 173). The witness's interestedness, his desire to suppress the truth, his unwillingness to give answers to pertinent questions on the pretext of failing memory, his feelings of hostility shown by his temper, attitude, demeanour etc. and all other circumstances must be taken into consideration and it is for the Court to determine in each case whether the witness has shown himself so hostile as to justify the exercise of its discretion to permit the witness to be cross-examined. In *Clarke* v. *Saffery*, 1824, Ry. & M. 126, Best, C. J., said: "There is no fixed rule which binds the counsel calling a witness to a particular mode of examining him. If a witness, by his conduct in the box, shows himself decidedly adverse, it is always in the discretion of the Judge to allow a cross-examination."

A witness is considered adverse when in the opinion of the judge he bears a hostile *animus* to the party calling him and not merely when his testimony contradicts his proof (*Surendra* v. *Ranee Dassi*, 47 Cal. 1043). A witness who is unfavourable, is not necessarily hostile (*Luchiram* v. *Radhacharan*, 49 Cal. 93). The mere fact that the interest of the witnes is necessarily adverse to that of the party calling him (*e.g.*, when a litigant is called by his opponent), does not permit cross-examination as a matter of right (*Price* v. *Manning*, 42 Ch. D. 372 C.A.). The matter as to whether permission should

or should not be given to cross-examine one's witness however hostile he may appear to be, is eminently one in the discretion of the trial judge and his decision, except in very exceptional circumstances, is not open to appeal (see *Rice* v. *Howard,* 1886, 16 Q.B.D. 681 ; *R.* v. *Williams,* 29 T.L.R. 128 ; *Price* v. *Manning,* supra, which have been referred to with approval in *Amritalal* v. *E.,* 42 Cal. 957 p. 1025 : 19 C.W.N. 676).

It was held in a number of cases that when a witness is cross-examined by the party calling him, his evidence cannot be believed in part and disbelieved in part, but must be excluded altogether. It must be done to discredit the witness altogether, and not merely to get rid of part of his testimony (*Faulkner* v. *Brine,* 1 F. & F. 254 ; *E.* v. *Satyendra,* 37 C.L.J. 173 : 71 I.C. 657 ; *Surendra* v. *Ranee Dassi,* 24 C.W.N. 860, *Maqbul* v. *E.,* 32 C.W.N. 872 ; *Bikram* v. *E.,* 50 C.L.J. 467). This view was not accepted in *E.* v. *Cama,* 1927 Bom. 501 : 29 Bom.L.R. 996 and *Sohrai* v. *R.,* 1930 Pat. 247. In view of the conflicting opinions, the matter was recently referred to a Full Bench in Calcutta and it was held that the evidence of a witness treated as 'hostile' must not be rejected in whole or in part, and that it must not be rejected so far as it is in favour of the party calling the witness and in favour of the opposite party. It was further held that the whole of such evidence, so far as it affected both parties favourably and unfavourably, must go to the jury for what it was worth (*Advance,* March, 4, 1931).

Can a party cross-examine himself when called as a witness by the opponent?

"It is one of the artifices of a weak and somewhat paltry kind of advocacy, for each litigant to cause his opponent to be summoned as a witness, with the design that each party shall be forced to produce the opponent so summoned as witness, and thus give the counsel for each litigant the opportunity for cross-examining his own client. It is a practice which their Lordships cannot help thinking all judicial tribunals ought to set themselves to render as abortive as it is objectionable. It ought never to be permitted in the result to embarass judicial investigation, as it has done in this instance"—*per* Lord Atkinson in *Kishorilal* v. *Chunnilal,* 31 A. 116 P.C. ; *Venkata* v. *Pappaya,* (1913), M.W.N. 826. In *Lalkunwar* v. *Chiranji Lal,* 32 All. 104 P.C. Lord Atkinson condemned it as a "vicious practice unworthy of a high-toned or reputable system of advocacy." *Per* Lord Shaw in *Gurbaksh* v. *Gurdial,* 46 C.L.J. 272 P.C.—"It sometimes takes the form of a manoevure under which the counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's own witness. This is thought to be clever, but it is a bad and degrading practice." It has been held in a recent case that where a witness stands in a situation which naturally makes himself adverse to the party desiring his testimony, the party calling the witness is not as of right entitled to cross-examine him, the matter being solely in the discretion of the Court under s. 154 to permit the person calling the witness to put any question to him which might be put in cross-examination by

the adverse party (*Luchiram* v. *Radhacharan*, 49 C. 93). To the same effect is the decision in *Price* v. *Manning*, 42 Ch. D. 372 A.C.) where it has been held that when a litigant is called as a witness by the opposite party, the latter is not entitled as a matter of right to cross-examine him as a hostile witness ; but it is a matter in the discretion of the Judge.

Where a plaintiff closes his case without calling the defendant as a witness and the defendant does not appear as a witness to support his own case, the plaintiff will not be allowed after the close of the defendant's case to call the defendant unless there has been some misleading representation by the other side that the defendant would be examined in support of his own case (*Allen* v. *Allen*, 1894, P. 248).

Cross-examination as to previous statements—written or oral.

Sec. 145 Evidence Act lays down the procedure by which a witness may in cross-examination be contradicted by his *previous statement in writing* or *reduced to writing*. A witness may in cross-examination be asked whether he made any previous statement in writing or reduced to writing, *relevant to the matters in question*, different from his present statement, without such writing being shown to him or being proved, and if a denial is given, it may be shown that he made such a statement ; but if it is intended to contradict him by the writing, his attention must, before such contradictory proof be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. He must be told about the circumstances of the

supposed statement sufficient to designate the particular occasion in which he is said to have made the statement and he must be asked whether or not he has made such a statement. The object is to give the witness an opportunity of explaining the discrepancy between the two statements. S. 145 does not say that the writing must be shown, but that, if it is intended to contradict a witness, his attention must be called to those parts of it, which are to be used for the purpose of so contradicting him (see *Ramappa* v. *Nagasam,* 47 Mad. 800). That is, not that he is to be allowed to study his former statement and frame his answers accordingly, but that if his answers have differed from his previous statement reduced to writing, and the contradiction is intended to be used as evidence in the case, the witness must be allowed an opportunity of explaining or reconciling his statements, if he can do so. And if this opportunity is not given to him, the contradictory writing cannot be placed on the record as evidence (*Takheya* v. *Tupsee,* 15 W.R. Cr. 23). It should be remembered that no question respecting any fact irrelevant to the matters in issue can be put to a witness under s. 145 for the mere purpose of contradicting him. A witness cannot be contradicted on collateral matters. A witness cannot be contradicted by previous inconsistent statements not of himself but of a third party (*Bobba Bhavamma* v. *Bobba Ramamma,* 78 I.C. 176).

As to the use of police diaries and statements recorded under s. 162 C. P. Code for purpose of contradiction, see Author's Law of Evidence, 4th Ed., pp. 948 *et seq.*

Former verbal statements may also be used for impeaching the credit of a witness. Sec. 155 (3) says that one mode of impeaching the credit of a witness is "by

proof of former statements inconsistent with any part of his evidence which is liable to be contradicted." This section applies to previous statements, both *oral and written,* whereas s. 145 applies only to statements in writing, and the use under s. 155 (3) is limited to the purpose of impeaching the credit of a witness. Like s. 145, s. 155 does not however expressly say that the attention of the witness should first be drawn to those parts of the statement which are to be used for the purpose of contradicting him. But there is no doubt that it is fair and just that the same rule should be adhered to (see *Q.* v. *Madho,* 15 A. 25 ; *Shamlal* v. *Anuntee,* 24 W.R. 312 ; *Amir Begam* v. *Mt. Begam,* 127 P.L.R. 1914 : 22 I.C. 861). In later cases it has been held that in making statements admissible under s. 155 (3), the provisions of s. 145 must be complied with (*Arnup* v. *Kedar,* 30 C.W.N. 835, 837 ; *Kashiram* v. *E.,* 109 I.C. 120 ; *Gopichand* v. *E.,* 1930 *L.* 491). In *Carpenter* v. *Wall,* 1840, 3 P. & D. 457, Patterson, J., said: "I like the broad rule that when you mean to give evidence of a witness's declaration for any purpose, you should ask him whether he ever used such expression."

An irrelevant matter requires no contradiction, and it is not admissible in evidence under s. 5. The expression "which is liable to be contradicted" in s. 155 (3) is equivalent to "which is relevant to the issue" (*Khadija Khanum* v. *Abdul Kareem,* 17 Cal. 344).

Previous statement for corroboration.

Under s. 157 the former statements of a witness may be proved to corroborate his later testimony as to the same facts. The former statement must have been made

at or about the time when the fact took place, or before any authority legally competent to investigate the fact. As to whether s. 157 is controlled by s. 162 Cr. P. Code, see Author's Law of Evidence, 4th ed. p. 982.

Privileged matters.

No judge or magistrate shall be compelled to answer questions (i) as to his own conduct in court as judicial officer, or (ii) as to anything which came to his knowledge in court as such unless ordered by a superior court ; but he may be examined as to other matters which occurred in his presence whilst he was so acting (s. 121). The privilege is the privilege of the witness *i.e.*, of the judge or magistrate. If he waives it or does not object to answer the question, it does not lie in the mouth of any other person to assert the privilege (*E.* v. *Chidda Khan*, 3 All. 573). On the same ground of public policy evidence derived from unpublished official records relating to affairs of State are protected from disclosure except with the permission of the head of the department concerned (s. 123). Resolution of Government censuring or reprimanding an officer is privileged (*Jehangir* v. *Secy. of State*, 27 Bom. 189). Statements before Income Tax Collector do not relate to affairs of State and are not privileged (*Venkata Chella* v. *Sampathu*, 32 Mad. 62). Communications made to a public officer in official confidence are also privileged when he thinks that public interests would suffer by the disclosure (s. 124). Statements made by witnesses in the course of a departmental enquiry into the conduct of police officers who were afterwards put on their trial are not privileged (*Harbans* v. *E.*, 16 C.W.N. 431). Where a public officer to whom

defamatory communication had been made in official confidence, claimed privilege on the ground that the publication might cause scandal in the office, the case did not come within s. 124 (*Bidhu Bhusan* v. *Harinath*, 7 C.W.N. 246). No magistrate or public officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenues (s. 125). Questions mentioned in ss. 121, 124, 125 are not barred. The witness has simply a privilege of refusing to answer them and a magistrate may warn the witness of his privilege, but he cannot disallow such questions (*Mahomed Ally* v. *E.*, 10 I.C. 917). The section says he "shall not compelled to say", but there is nothing to prohibit the magistrate or police officer from saying, if he be so willing.

No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married ; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representatives in interest consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime against the other (s. 122). The prohibition continues after death of one of the parties or after divorce. The widow of a deceased person is not his "representative in interest" for the purpose of giving consent (*Nawab Howladar* v. *E.*, 40 Cal. 891). The protection would not extend to communications before marriage. It would not also extend to facts coming to knowledge during marriage, but from

extraneous sources (*O'Connor* v. *Marjoribanks*, 4 M. & G. 435).

Professional communications by client to a barrister, attorney, pleader, or vakil, or the contents or condition of any document with which he has become acquainted *in the course and for the purpose of his professional employment*, or any advice given to his client in the course of and for the purpose of such employment, shall not be disclosed except with his client's express consent. The obligation continues after the employment has ceased. Communication made in furtherence of any illegal purpose or any fact observed by the lawyer in the course of his employment showing the commission of any fraud or crime since the commencement of his employment is not protected (s. 126). The rule in s. 126 applies to interpreters and clerks or servants of lawyers (s. 127). The privilege is the privilege of the client and not of the legal adviser. The latter is therefore bound to claim the privilege unless it is waived by the client expressly (under s. 126) or impliedly (under s. 128). A party to a suit does not by giving evidence therein at his own instance or otherwise lose the privilege, nor does he lose it by merely calling his legal adviser as a witness on his behalf, unless he questions him on matters, which but for such question the legal adviser would not be at liberty to disclose (s. 128). The obligation of secrecy imposed by s. 126 continues even after the employment has ceased; and has nothing to do with the question whether at the time the communications were made there was any pending litigation or any prospect of it (*In re an Attorney*, 84 I.C. 353; *Minet* v. *Morgan*, 1873, L.R. 8 Ch. 361). The law relating to professional communications is the

same in India as in England (*Framji Bhikaji* v. *Mohan*, 18 Bom. 263). There can be no hostile inference from refusal to allow disclosure of professional communications. When a document is in fact privileged, no adverse inference can be drawn from its non-production, for to allow this would be to destroy the privilege (*per* Woodroffe, J., in *Weston* v. *Pearymohan*, 40 Cal. 898, p. 919; see also *Dulhin* v. *Harnandan*, 20 C.W.N. 617).

A similar protection is afforded to the client. No one shall be compelled to disclose confidential communication between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given but no others (s. 129).

A witness who is not a party to a suit *i.e.*, a stranger shall not be compelled to produce his title deeds or any documents of the nature of title deeds *e.g.*, documents of pledge or mortgage, or any document the production of which might tend to criminate him unless he has agreed in writing to produce them (s. 130). No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production (s. 131). It has been held that in criminal cases the document must be given up, notwithstanding any instructions from the depositor (*R.* v. *Daye*, 1908, 2 K.B. 333).

A witness shall not be excused from answering a question *relevant to the matter in issue* in any suit or in

any civil or criminal proceeding, upon the ground that the answer to such question will criminate him, or may tend directly or indirectly to criminate him, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind: Provided that no such answer which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer (s. 132). The word 'compelled' in this section applies only where the Court has compelled the witness to answer a question inspite of his objection and not to a case when the witness has not asked to be excused from answering, but gives his answer voluntarily without any claim to have himself excused (*Q.* v. *Gopal Dass*, 3 Mad. 271; *Q. E.* v. *Moss*, 12 All. 88; *Q. E.* v. *Ganu*, 12 Bom. 440; *E.* v. *Cunna*, 21 Bom. L.R. 1247 F.B.: 59 I.C. 324; *Kalu* v. *Sital*, 40 All. 271; *Ganga* v. *E.*, 42 All. 257). In *Chatur* v. *E.*, 43 All. 92 it has been held (not following 40 All. 271 and 42 All. 257) that protest is not necessary, and a witness who answers a question by Court or counsel, specially on a point relevant to the issue, comes under the protection of the proviso. It has been held that a complainant who deliberately makes a defamatory statement when asked by a magistrate to state his grievance, does not enjoy the protection given to an ordinary witness (*Dinshaw* v. *Jehangir*, 47 Bom. 15).

Cross-examination to credit—Impeaching credit of witness.

The credit of a witness may be impeached either by (i) cross-examining the witness himself as to his veracity,

position in life etc. under s. 146 I.E.A. ; or (ii) by giving independent evidence as to his untrustworthiness under s. 155.

S. 146 says: "When a witness is cross-examined, he may in addition to the questions hereinbefore referred to, be asked any questions which tend—

(1) to test his veracity,

(2) to discover who he is and what is his position in life, or,

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture".

Along with this section should be read the provisions of s. 153 which says that when a witness has answered a question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him, but if he answers falsely, he may afterwards be charged with giving false evidence. There are two exceptions to this rule: (1) If a witness denies the fact of a previous conviction evidence may be given of his previous conviction ; (2) If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may contradicted.

S. 146 gives the cross-examiner a wider power of interrogation than is conferred by s. 138 which says that the cross-examination must relate to relevant facts. The provisions before relate to cross-examination on facts in issue or facts relevant to the issue. But when it comes to impeaching the credit of a witness, the questions must

necessarily be on facts not relevant to the matters in issue. A witness therefore under s. 146 may be cross-examined not only as to the facts of the case but also as to facts not material or relevant to the issue, with a view to impugn his credibility and thus shake his whole testimony. If the question asked is directly relevant *i.e.*, if it relates to matters which are the points in issue, the witness is not protected from answering even if the answer tends to criminate him (see s. 147 and s. 132). But if it is relevant only as tending to impeach the witness's credit, it lies with the judge to decide whether the witness shall be compelled to answer it or not (see s. 148). As a general rule, if the questions relate to *relevant facts*, the witness must answer, whether or not his answer will criminate him or tend directly or indirectly to expose him to penalty or forfeiture unless protected by public policy (ss. 123, 124, 125) or privilege (ss. 126, 129) ; and the witness might be contradicted as to such fact, by the admission of evidence. But if the questions relate to facts *relevant only as tending to impeach the witness's credit*, it is in the discretion of the Court to compel him to answer or not (s. 148) and he will not be allowed to be contradicted except in the two cases mentioned in s. 153 referred to above.

The privilege conferred by s. 146 may be abused by an unscrupulous cross-examiner and a witness may be subjected to the grossest insult and annoyance by being put objectionable questions about his private life, character or long forgotten improprieties of conduct, no matter howsoever remote their bearing may be, under the pretence of impeaching his credit. It is with the object of preventing such abuse that s. 148 and the sections that

follow it were framed. S. 148 enacts that if any such question is not directly material or relevant to the issue, but is relevant to the matter only in so far as it affects the credit of the witness by injuring his character, it is for the Court to decide whether or not the witness shall be compelled to answer it, and it may in its discretion warn the witness that he is not obliged to answer. Cls. (1), (2), (3) of the section lay down some rules as to how the discretion is to be used by the Court.

Questions affecting the credit of a witness should not be asked without reasonable ground (s. 149). If the Court is of opinion that any such question was asked without any reasonable grounds it may report the matter to the authorities for disciplinary action (s. 150). The *illustrations* to s. 149 indicate what reasonable grounds may or may not be. It is not enough to plead instructions. Counsel are not justified in making charges of fraud or crime unless they are personally satisfied that there are reasonable grounds for putting them forward (*Weston* v. *Peary Mohan*, 40 Cal. 898). It is unprofessional on the part of counsel to cross-examine a witness as to facts within his personal knowledge. When counsel in the course of cross-examination makes a charge against a witness or third parties, the Court is entitled to ask whether he made the charge on instruction, and if so, on whose. Instructions to counsel are privileged only in the sense of being protected from disclosure to the opponent. There is no privilege as against the Court—*per* Woodroffe & Cox, JJ., in *ibid.*

The various methods of contradicting a witness or impeaching his credit may be summarised:—

(i) When the question put in cross-examination for

discrediting a witness is *directly relevant* to the issue, his answer may always be contradicted by independent evidence. A party is always entitled to give evidence in proof or disproof of a relevant fact. [See s. 5 and *illustration* (*c*) to s. 153).

(ii) Witnesses to character may be cross-examined (s. 140).

(iii) Witnesses may be contradicted by previous statements in writing (s. 145).

(iv) Witnesses may be contradicted by previous verbal statements (s. 155, cl. 3).

(v) The credit of witnesses may be impeached or shaken by cross-examining the witness as to his knowledge of the facts deposed to, opportunities of observation, powers of memory and perception, disinterestedness etc. (s. 138), his veracity, position in life, injury to character by criminating questions (ss. 132, 146, 147), his errors, omissions, antecedents, mode of life etc., etc. (ss. 146, 148).

(vi) Cross-examination is not the only mode of impeaching the credit of a witness. It may also be done by giving independent evidence *i.e.*, by the testimony of other witnesses. S. 155 lays down that it may be done: (1) by the evidence of general reputation for untruthfulness given from personal knowledge; (2) by evidence of bribe or other corrupt inducement; (3) by proof of former inconsistent statements; (4) by evidence of general immorality of prosecutrix, in rape cases.

If the question in cross-examination is *relevant only in so far as it affects the credit* of a witness, the answer shall not be contradicted, except in two cases viz., (*a*) denial of previous conviction, (*b*) denial of question tending to impeach impartiality (*ante*, p. 422; s. 153).

When a female witness was asked whether she was the kept mistress of the party calling her and denied the fact she was allowed to be contradicted as it would show bias. (*Thomas* v. *David*, 7 C. & P. 350); but if she were asked whether she was a prostitute and denied, she could not be contradicted.

Abuse of Cross-examination to Credit.

There is a general wail from persons who have to go to the witness box that the privilege of cross-examination to credit is very frequently abused and that they are unnecessarily and wantonly disgraced by being asked numerous questions in regard to their family lives, private affairs, past errors, long forgotten improprieties of conduct and a thousand other things which can have no bearing whatever upon their veracity or the points in issue. Unfortunately, however, the complaint is not without foundation. True, the Judge has the power to protect the witness, and to disallow improper questions in the exercise of his discretion. But the mischief is done the moment the cross-examiner throws out the offensive question and it is little consolation that the Judge ultimately protects the witness from answering it. The discretion therefore really rests with the cross-examiner, in the first instance. His good sense and sense of honour coupled with the respect for his profession ought to dictate whether the question ought in conscience to be asked. It has not infrequently been seen that even a witness who has been called to prove a minor fact not really disputed, or which is of very little importance, is not spared the humiliation. He is treated with a volley of questions regarding many transactions in his past life,

or private affairs pregnant with suggestions of a sinister kind. A sort of almost cruel delight is felt in exposing a witness to such wanton attacks and the occasion is seized upon by the opponent in paying old scores. The cross-examiner who allows himself to become a tool in the hands of an unscrupulous client, fails in his duty, and inflicts an incalculable injury for which the witness cannot seek any redress. The impropriety of such cross-examination has been discussed before (*ante* p. 131).

The following extract from Taylor, will prove instructive :—

It however, seems clear that where the transaction, as to which the witness is interrogated, forms any material part of the issue, he will be obliged to give evidence, however strongly it may reflect on his own conduct. Indeed it would be alike unjust and impolitic to protect a witness from answering a question, merely because it would have the effect of degrading him, where the testimony is required either for the due administration of public justice, or to protect the property, the reputation, the liberty, or the life of a fellow subject. Where, however, the question is not directly material to the issue but is only put for the purpose of testing the character, and consequent credit, of the witness, there is much more room for doubt. Several of the older dicta and authorities tend to show, that in such case the witness is not bound to answer ; but this privilege, if it still exists, is certainly much discountenanced in the practice of modern times. No doubt cases may arise, where the Judge in the exercise of his discretion, would properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries to discreditable transactions of

a remote date might in general, be rightly suppressed; for the interests of justice can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance, at the pleasure of any future litigant. So questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that witness who could be guilty of them would not be a man of veracity, might very fairly be checked. But no protection of this sort should be extended to cases where the enquiry relates to transactions comparatively recent, bearing directly on the moral principles of the witness and his present character for veracity. In such cases as these, a person ought not to be privileged from answering, notwithstanding the answer may disgrace him (Taylor, ss. 1459-1462).

Lord Chief Justice Cockburn, expressed himself thus on the subject:—

"I deeply deplore that members of the Bar so frequently, unnecessarily put questions affecting the private life of witnesses, which are only justifiable when they challenge the credibility of a witness. I have watched closely the administration of justice in France, Germany, Holland, Belgium, Italy, and a little in Spain, as well as in the United States, in Canada, and in Ireland, and in no place have I seen witnesses so badgered, brow-beaten, and in every way so brutally malterated as in England. The way in which we treat our witnesses is a national disgrace, and a serious obstacle instead of aiding the ends of justice. In England the most honourable and conscientious men loathe the witness-box. Men and women of all ranks shrink with terror from subjecting themselves to the wanton insult and bullying misnamed cross-

examination in our English Courts. Watch the tremor that passes the frames of many persons as they enter the witness box. I remember to have seen so distinguished a man as Sir Benjamin Brodie shiver as he entered the witness box. I daresay his apprehension amounted to exquisite torture. Witnesses are just as necessary for the administration of justice as judges or jurymen and are entitled to be treated with the same consideration, and their affairs and private lives ought to be held as sacred from the gaze of the public as those of the judges or jurymen. I venture to think that it is the duty of a judge to allow no questions to be put to a witness, unless such are clearly pertinent to the issue before the Court, except where the credibility of the witness is deliberately challenged by counsel and that the credibility of a witness should not be wantonly challenged on slight grounds" (Irish Law Times, 1874, quoted in Wellman, p. 173).

There are occasions when the credit of a witness should be vigorously attacked by showing that from his antecedents, associations and character, he is not a man whose testimony can be relied upon. Recent incidents throwing light on the moral principles of a witness affecting his veracity must of course be brought out however unpleasant they may be. But the privilege should not be abused by succumbing to the temptation of making indiscriminate attacks on each and every witness. There may be materials in the advocate's possession for making personal attacks on the character of a witness, but the question is whether throwing mud would serve any useful purpose other than outrage to the feelings of a man. Errors of conduct in the past or long forgotten improprieties should not be raked up, merely because the client

insists on humiliating his adversary. The propriety or impropriety of the questions is to be judged by the standard laid down in s. 148 I.E.A. The advocate should reflect—(*i*) Whether the truth of the imputation conveyed would *seriously affect* the opinion of the Court as to the trustworhiness of the witness *on the matter to which he testifies.* Thus it would be preposterous to ask a woman who was an unfortunate and accidental spectator of an affray in the street, whether she was a prostitute or demi-rep. But in a case of rape, the prosecutrix may be cross-examined as to her acts of immorality not only with the accused but with other persons (s. 155). (*ii*) Whether the imputation conveyed relates to improprieties or errors of conduct or other discreditable transactions of so remote a date, or of such a characer that it would, if at all affect in a *slight degree* the Court's opinion as to the witness's veracity *on the matter to which he testifies.* Thus, "if a woman" said Sir James Stephen "prosecuted a man for picking her pocket, it would be monstrous to enquire where she had illegitimate child ten years before, although circumstances might exist which render such an enquiry necessary" (Steph. Genl. View of Cr. Law). (*iii*) Whether there is *a great disproportion* between the importance of the imputation conveyed and the importance of the witness's evidence. Thus, if a medical man is called to depose about the injuries of a person attended to by him or about an autopsy held by him, it would be preposterous if he was asked questions regarding his private life and character which do not concern any other man. Sir James Stephen, said: "I shall not believe, unless and until it is decided upon solemn agreement, that by the law of England a person who is called to prove a minor fact,

not really disputed, in a case of little importance, thereby exposes himself to having every transaction in his past life, however private, inquired into by persons who may wish to serve the basest purpose of fraud or revenge by doing so. Suppose for instance, a medical man were to prove the fact that slight wound had been inflicted and had been attended to by him ; would it be lawful under pretence of testing his credit, to compel him to answer upon oath a series of questions as to his private affairs extending over many years and tending to expose transactions of the most delicate and secret kind, in which the fortune and character of other persons might be involved. If this is the law, it should be altered." (Steph. Digest, pp. 196, 197).

Sir Frank Lockwood in the course of an address in March 1893 said: "According to the public press there were a lot of swashbucklers going about the world disguised as lawyers, who endeavoured to get their living by the injury of reputations, by cruel attacks upon credit. Those whom he was addressing knew perfectly well that any man who so betrayed a professional trust that was placed within his hands was not only a knave, but a fool. Whoever had been in the habit of going into a Court of Justice, knew perfectly well that cruel and irrelevant cross-examination was disastrous to the cause whose advocate administered it. He believed that if cross-examination was improper, or irrelevant, or cruel, it brought its punishment at once, and he was certain that the cause was lost that was endeavoured to be bolstered up by it. No one knew better than the distinguished advocates he saw around him when to stop a cross-examination. The hint came from the jury-box before

much mischief was done and the advocate was a bad one who did not take the hint. (Quoted in Wrottesley, p. 91).

"Counsel may have in his possession material for injuring the witness, but the propriety of using it often becomes a serious question even in cases where its use is otherwise legitimate. An outrage to the felings of a witness may be quickly resented by a jury, and sympathy take the place of disgust. Then, too, one has to reckon with the judge, and the indignation of a strong judge is not wisely provoked. Nothing could be more unprofessional than for counsel to ask questions which disgrace not only the witness, but a host of innocent persons, for the mere reason that the client wishes them to be asked. (Wellman, p. 168).

When there is an appropriate occasion for attacking the character of a witness by reference to his past character and misdeeds, an advocate cannot shrink from the task, disagreeable though it may be to many. The feelings of a dishonest witness cannot be placed above the interests of the parties in a case and justice. "Lord Bramwell in an article in the *Nineteenth Century* for February 1892 strongly defended Sir Charles Russel and his imitators who were severely criticised as "forensic bullies" and complained of as "lending the authority of their example to the abuse of cross-examination to credit." "A judge's sentence for crime, however much repented of, is not the only punishment; there is the consequent loss of character in addition, which should confront such a person whenever called to the witness stand." "Women who carry on illicit intercourse, and whose husbands die of poison, must not complain at having the veil that ordinarily screens a woman's life from public inquiry

rudely torn aside." "It is well for the sake of truth that there should be wholesome dread of cross-examination." "It should not be understood to be a trivial matter, but rather looked upon as a trying ordeal." "None but the sore feel the probe." Such were some of the many arguments of the various upholders of broad license in examinations to credit." (Wellman, p. 172).

Re-establishing Credit and Recrimination.

Where a witness's credit has been attacked by giving evidence of general reputation for untruthfulness under cl. (1) of s. 155 he may *re-establish his credit* either (*a*) by cross-examinnig the witness as to his reasons, means of knowledge, &c., (v. *explanation*) or (*b*) by giving independent general evidence that the witness is worthy of credit. (See Tay. s. 1473, Steph. Art. 133). It seems doubtful how far independent evidence of the latter description is admissible where merely particular discrediting facts have been elicited in cross-examination or proved against a witness (Phip. p. 482). In re-establishing credit, evidence will not be admitted from which merely an inference might be drawn that the witness has been a witness of truth (*R.* v. *Parker*, 1783, 3 Doug. K. B. 242) ; and evidence of good character does not become admissible if the cross-examination goes no further than to show that the witnesses contradict one another (*Durham* v. *Beaumont*, 1 Camp. 207—Hals, vol. 13, para. 817).

The party whose witness's character for truthfulness has been impugned, may *recriminate, i.e.*, an impeaching witness may in his turn, be attacked either in cross-examination or by independent general evidence that he

is unworthy of credit, but no further recrimination than this is probably allowable (Tay. s. 1473).

Character evidence of parties.

Under s. 52 of the Evidence Act, where character is *not in issue* in any civil case, evidence of character of any person concerned cannot be given with a view to show that any conduct imputed to him is probable or improbable. Character evidence is irrelevant, except in so far as such character appears from facts otherwise relevant. S. 52 speaks of "any person concerned," but obviously the expression refers to the parties to a litigation. As to witnesses, their character may always be impeached to test their veracity or to shake their credit by injuring their character (s. 146).

In civil cases therefore, evidence of character of parties, good or bad is generally irrelevant, unless character is of the substance in issue. To admit character evidence of parties would be to allow to create a prejudice. If character affects the amount of damages in civil cases, it becomes relevant (s. 55). Previous good character is however relevant in criminal cases (s. 53). Character includes both reputation and disposition (*Expln.* to s. 55).

Refreshing memory.

Ordinarily a witness deposes to facts from his recollection but memory fades and it is therefore very necessary that he should be allowed to assist his memory by looking into documents containing an account of them. This is known as *refreshing memory*. A reference to the written memoranda has the effect of reviving in his mind a recollection of the facts recorded therein. A witness may

through lapse of memory, be honestly making a statement contrary to what is contained in the written memorandum. He is allowed to refresh his memory because a witness should not suffer from a mistake, and may explain an inconsistency—*per* Montague Smith, J., in *Halliday* v. *Holgate*, 17 L.T. 18.

In order that a person may be allowed to refresh his memory from a document, certain conditions have been laid down in s. 159:—(1) The writing must have been made *by the witness himself contemporaneously* with the transaction to which he testifies or so soon afterwards that the facts were fresh in his memory or (2), if the writing is made by some one else, it must have been *read* by the witness within the aforesaid time *and known* by him *to be correct, i.e.*, he must have read it when the facts were fresh in his memory and recognised its accuracy. It should be remembered that it is not necessary that a document should be legally admissible before it may be used to refresh memory, *e.g.*, an invalid lease (*Bolton* v. *Tomlin*, 5 A. & E. 836) or an unstamped document (*Birchall* v. *Bullough*, 1896, 1 Q.B. 326) may be used for the purpose. The third para of the section settles a point regarding which English decisions do not appear to be unanimous. It says that where the right to refresh memory exists, the Court if satisfied about the non-production of the original, may permit the witness to refer to a copy. Under the last para, an expert may refer to professional treatises. Their opinion is founded mostly on authoritative books and s. 51 declares that when such opinion is relevant, the grounds of the opinion are also relevant. A witness may not have any independent recollection of the facts, even after looking at a document, yet if it is sure that the facts

were correctly recorded, it may be used to refresh his memory. This is dealt with in s. 160. S. 159 deals with cases where a reference to the writing revives in the witness's mind a recollection of the facts relating to the transaction *i.e.*, as soon as he looks at the writing he remembers the facts. But it may be that even a perusal of the document does not refresh his memory *i.e.*, it does not revive in his mind a recollection of the facts. Sec. 160 extends the rule in s. 159 to such cases. Under it, it is not necessary that the witness after looking at the written instrument should have any *independent* or *specific recollection* of the matters stated therein. They may have wholly slipped through his memory. Even then, he may testify to the facts referred to in it, if he recognises the writing or signature and feels sure that the contents of the document were correctly recorded. Although he has no independent recollection after seeing the document, yet he must be able to say with certainty that the facts are accurate and really occurred. Thus an attesting witness of an old document may say that he does not remember the facts, but his signature is there and that he has no manner of doubt that he signed after witnessing the execution of the document (see *Maugham* v. *Hubbard*, 1828, 8 B. & C. 14). As the recollection of the witness is not revived, it cannot strictly be called "refreshing memory." That is why s. 160 says that a witness may *"testify to facts"* and not "refersh his memory" as in s. 159.

Under s. 159 it is not necessary that the witness must be sure, that what was reduced to writing by him is a correct record. It is enough if, on reading it, the true facts are recalled to his memory. But if he does not actually recollect what the appellant said, if the

words are not recalled to his memory, then the notes of a speech may be admitted under s. 160, if he is sure that the facts were correctly recorded in the notes. If the words of the speaker have not been correctly recorded, but only the writer's impressions of those words, then the notes will be inadmissible under s. 160—*per* Sankaran Nair, J., in *Re Mylapore Krishnasammi,* 32 Mad. 384 : 5 M.L.T. 393 : 9 Cr. L. J. 456.

When a written record bring to the mind of a witness neither any recollection of the facts mentioned in it nor any recollection of the writing itself, but which nevertheless enables him to swear to a particular fact from the conviction of his mind on seeing the writing which he knows to be genuine, the witness may be allowed to refresh his memory by looking at the record (*Abdul Salim* v. *E.,* 49 Cal. 573 : 35 C.L.J. 279 : 26 C.W.N. 680 : 69 I.C. 145).

Cross-examination upon answers in reply to questions by Court or of witnesses called by Court.

Under s. 165 I.E.A. the Judge may, in order to discover or to obtain proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness or of parties about any fact relevant or irrelevant and neither the parties nor their agents shall be entitled to make any objection to any such question, nor without the leave of the Court, to cross-examine any witness upon any answer given in reply to such questions. This rule applies where the Court interrogates a witness already in the box and who has been called and examined by a party, or whom a party has declined to examine (see *R.* v.

Sakharam, 11 B.H.C.R. 166). This should be distinguished from a case where the Court of its own motion calls a witness and examines him. Sec. 165 does not provide for such a case, and a witness called by the Court may be cross-examined by the parties. His examination is not to be confined to such questions as the Court sees fit to put to him, but his knowledge as to facts he states may be tested as in the case of any other witness by questions put by the parties (*Tarinicharan* v. *Sarada*, 3 B.L.R., A.C. 154, 148; *Gopal* v. *Manick*, 24 Cal. 288; *Mohendranath* v *Q. E.*, 29 Cal. 387). The English law appears to be otherwise. It has been held that a witness called by the judge and examined may not as of right be cross-examined, without the leave of the Court which would no doubt be allowed if the answers given are adverse to any of the parties (*Coulson* v. *Disborough*, 1894, 2 Q.B. 316 C.A.; see however *Re Enoch*, 1910, 1 K.B. 327 C.A.). In a recent case it has been held that s. 165 applies to Court witnesses; the expression "any witnesses" appears to include such witnesses. Parties have no absolute right to examine a Court witness (*Makund* v. *Gafur-un-nissa*, 74 I.C. 108).

CHAPTER XVII.

RE-EXAMINATION.

The right to re-examine a witness arises only after the conclusion of cross-examination and as s. 138 says, it shall be directed to the explanation of matters referred to in cross-examination. The object is to give an opportunity to reconcile the discrepancies, if any, between the statements in ex-in-chief and cross-examination or to explain any statements inadvertently made in cross-examination or remove any ambiguity in the deposition or suspicion cast on the evidence by cross-examination. Where there is no ambiguity or where there is nothing to explain, questions put in re-examination with the sole object of giving a chance to the witness to undo the effect of a previous statement, should never be allowed. Leading question should not be asked in re-examination (s. 142).

A good advocate should watch his witness attentively during his cross-examination and make a note of the points which require explanation or elucidation. Sometimes the witness indicates a desire to speak further in order to explain a thing, and the advocate who has his eyes fixed upon him will not fail to detect it. Sometimes the opposing advocate cuts him short and makes the witness stop, saying that he does not want a word more than what he asked about. The advocate should note all these and other points which appear damaging to him,

and re-examine the witness on them, so that the value of his testimoney may not be impaired.

Before proceeding to re-examine his witness, the advocate should first ascertain which of the facts spoken to in examination-in-chief have been dislodged or obscured. He should also determine whether there is any real chance of mending matters. Needless or venturesome re-examination has its dangers.

Sir Frank Lockwood said:—"Re-examination—the putting Humpty-Dumpty together again—was by no means an unimportant portion of an advocate's duty. Once, in the Court of Chancery, a witness was asked in cross-examination by an eminent Chancery leader, whether it was true that he had been convicted of perjury. The witness owned the soft impeachment, and the cross-examining counsel very properly sat down. Then it became the duty of an equally eminent Chancery Q. C. to re-examine. 'Yes,' said he, 'it is true that you have been convicted of perjury. But tell me: Have you not on many other occasions been accused of perjury, and been acquitted?' I recommended that as an example of the way in which it ought not to be done."

The re-examination should be confined to matters arising out of the cross-examination, and ordinarily the counsel will not be allowed to question the witness on new matter which could have been asked in exam-in-chief. If it is desired to introduce new matter in re-examination, the counsel should in every instance seek the permission of the Court. The Judge however, may in his discretion allow such a question to be put,—*per* Cave, J., in *Scott* v. *Sampson*, 8 Q.B.D. 506. In the *Queens' Case*, 2 B. & B. p. 297, Lord Tenterdon said:—

"I think that counsel has a right upon re-examination to ask all questions which, may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions ; but I think he has no right to go further, and to introduce matter new in itself and not wanted for the purpose of explaining either the expressions or the motives of the witness."

Thus, where a certain conversation had been admitted in cross-examination, re-examination as to distinct matters occurring in that conversation will not be allowed ; *Prince* v. *Samo*, 7 A. & E. 627. If however, new matter is allowed to be introduced in re-examination by the Court, the opposite party has the right to further cross-examine upon that matter.

Even if inadmissible matters are introduced in cross-examination, the right to re-examine on those matters remains ; *Blewett* v. *Tregonning*, 3 A. & E. 554 (but see *R.* v. *Cargill*, 1913, 2 K.B. 271 where it has been said that the rebuttal of irrelevant evidence will not be allowed). If facts are called out on cross-examination which tend to impeach the integrity or character of the witness, he may in re-examination make explanation showing that such facts are consistent with his credibility as a witness although such testimony would be otherwise irrelevant (Burr. Jones, Ev. s. 875).

The court has always the power to recall a witness at any stage of the proceedings (Or. 18, r. 17 C. P. Code) and to put any question it pleases, in any form (s. 165). If the examination of the witness has been conducted unskilfully, the Court usually examines a witness at the

close of his examination *i.e.*, after re-examination. There is no right of re-examination after the interrogation by court.

The proper office of re-examination (which is often inartistically used as a sort of summary of all the things adverse to the cross-examining counsel which may have been said by a witness during cross-examination) is by asking such questions as may be proper for that purpose, so as to draw forth an explanation of the meaning of the expressions used by the witness in cross-examination, if they be in themselves doubtful ; and also of the motive, or provocation which induced the witness to use those expressions ; but a re-examination may not go further, and introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. (Tay. s. 1474).

CHAPTER XVIII.

MODE OF DEALING WITH PARTICULAR CLASSES OF WITNESSES.

Lying witnesses.

Exposure of falsehood and discovery of truth is one of the principal objects of cross-examination. But the task is more difficult than it first appears, specially when dealing with intelligent or practised witnesses who have come to support a party's cause by deliberate perjury. The cross-examiner must first make himself sure that the witness intends perjury. His demeanour should be carefully watched, and his manner of giving evidence should be studied with care. It must be ascertained what portion of his testimony is false. A witness whose testimony is partially false is more difficult to deal with than a wholly lying witness. A half-truth is the blackest of lies. Avoid giving the witness cause for suspicion, as the witness is apt to be put on his guard and to be cautious in his answers, if he suspects that you doubt his veracity.

Wellman says: "If however, the manner of the witness and the wording of his testimony bear all the earmarks of fabrication, it is often useful, as your first question, to ask him to repeat his story. Usually he will repeat it in almost indentically the same words as before, showing he has learnt it by heart. Of course it is possible, though not probable, that he has done this and still is

telling the truth. Try him by taking him to the middle of his story, and from there jump him quickly to the beginning and then to the end of it. If he is speaking by rote rather than from recollection, he will be sure to succumb to this method. He has no facts with which to associate the wording of his story ; he can only call it to mind as a whole, and not in detachments. Draw his attention to other facts entirely disassociated with the main story as told by himself. He will be entirely unprepared for these new inquiries, and will draw upon imagination for answers. Distract his thoughts again to some new part of his main story and then suddenly, when his mind is upon another subject, return to those considerations to which you had first called his attention, and ask him the same questions a second time. He will again fall back upon his imagination and very likely will give a different answer from the first—and you have him in the net. He cannot invent answers as fast as you can invent questions, and at the same time remember his previous inventions correctly ; he will not keep his answers all consistent with one another. He will soon become confused and, from that time on, will be at your mercy. Let him go as soon as you have made it apparent that he is not mistaken but lying." (Wellman, pp. 48-49).

Cox says :—"An excellent plan is to take the witness through his story, but not in the same order of incidents in which he told it. Dislocate his train of ideas, and you put him out ; you disturb his memory of his lesson. Thus begin your cross-examination at the middle of his narrative, then jump to one end, then to some other part the most remote from the subject of the previous question. If he is telling the truth this will not confuse him, because

he speaks from impressions upon his mind ; but if he is lying, he will be perplexed and will betray himself, for speaking from the memory only, which acts by association, you disturb that association, and his invention breaks down.

"When you are satisfied that the witness is drawing upon his invention, there is no more certain process than a rapid fire of questions. Give him no pause between them ; no breathing place, nor point to rally. Few minds are sufficiently self-possessed as, under such a catechising, to maintain a consistent story. If there be a pause or hesitation in the answer, you thereby lay bare the falsehood. The witness is conscious that he dares not stop to think whether the answer he is about to give will be consistent with the answers already given, and he is betrayed by his contradictions. In this process it is necessary to fix him to time, and place and names.—'You heard him say so?' 'When?' 'Where?' 'Who was present?' 'Name them', 'Name one of them'. Such a string of questions, following one upon the other as fast as the answer is given, will frequently confound the most audacious. Fit names, and times and places, are not readily invented, or if invented not readily remembered. Nor does the objection apply to this that may undoubtedly be urged against some others of the arts by which an advocate detects falsehood, namely, that it is liable to perplex the innocent, as well as to confound the guilty ; for if the tale be true, the answers to such questions present themselves instantaneously to the witness's lips."

Taylor says:—While simplicity, minuteness, and ease are the natural accompaniments of truth, the

language of witnesses coming to impose upon the jury is usually laboured, cautious and indistinct. We have, too, more or less conclusive indications of insincerity of falsehood when we find a witness over-zealous on behalf of his party ; exaggerating circumstances, assuming an air of bluster and defiance ; answering without waiting to hear the question ; telling his story glibly and with extraordinary accuracy in language obviously not his own ; forgetting facts where he would be open to contradiction ; minutely remembering others, which he knows cannot be disputed ; reluctant in giving adverse testimony ; replying evasively or flippantly ; pretending not to hear the question for the purpose of gaining time to consider the effect of his answer ; affecting indifference ; or often vowing to God and protesting his honesty. In the testimony of witnesses of truth there is, on the other hand, a calmness and simplicity ; a naturalness of manner ; an unaffected readiness and copiousness of detail, as well in one part of narrative as another ; and an evident disregard of either the facility or difficulty of vindication or detection. (Tay. s. 52).

Powell says: "A witness of truth usually gives prompt, frank answers to all questions whether they tell for or against his side. Even if an untruthful witness shows no signs of weakness in his examination-in-chief, under skilful cross-examination he will usually disclose his latent bias or motive. If he suddenly becomes deaf or dull when awkward questions are asked ; if he shuffles or fences with the question, or answers it "by the card," then his evidence will be discredited. Nevertheless it must be remembered that demeanour is not conclusive ; a truthful witness may create a bad impression while an

untruthful one may appear to be frank and honest." (Powell, p. 505).

Alison says: "Where a witness is evidently prevaricating or concealing the truth, it is seldom by intimidation or sternness of manner that he can be brought to let out the truth. Such measures may sometimes terrify a timid witness into a true confession, but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The *most effectual method* is to examine rapidly and minutely as to a number of subordinate and apparently trival points in his evidence, concerning, which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fails in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that in the course of such a rapid examination, facts most material to the cause are elicited, which were either denied or but partially admitted before. In such cases there is no ground on which the facts thus reluctantly extorted, or which have escaped the witness in an unguarded moment can be laid aside by the jury. Without doubt they come tainted from the polluted channel through which they are adduced; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens that in this way the most important testimony in a case is extracted from an unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination

in opposition to an obvious desire to conceal." (Alison's Practice of Cr. Law, p. 43).

"Don't know" or "Don't recollect" witness.

There are witnesses who attempt to avoid disclosure of facts or discussion upon a subject by repeating that they 'don't know' or 'don't recollect.' They are difficult to deal with. But the advocate should not let them off easily. They must be plied with numerous questions and the advocate will have scored a point if he can show from their persistence and evasiveness that they are determined to seek shelter under the plea of forgetfulness although there is every reason to think that they are aware of the facts.

Cox says: "Sometimes a witness will not answer. He does not choose to know. He will not remember. He is obstinately ignorant. You are aware that he could tell you a great deal if he pleased, but he has reasons for forgetting. Such a witness will tax your skill and patience. To conquer him you will need as much of patience as of art. The first rule is to keep your temper; the second, to be as resolute as himself; the third to discover his weak place—every person has some weak point, through which he is accessible. If you betray the slightest want of temper, the witness will have the advantage of you, for you will enlist his pride in defence of his determination. If you show that you are resolved to have an answer, you will shake him by the influence which a strong will obtains always over a weaker one, by that wonderful power which persistency never fails to exercise."

"Where the witness testifies to facts upon which he cannot be contradicted, and declares that he cannot remember as to matters upon which he can be contradicted, the better course is to make as prominent as possible the facts which he asserts he does not remember. The more he can be made to dwell upon those he does profess to remember, and the more positively he can be made to assert them, the better. If from his own testimony it can be shown that he is positive and bold where there is no fear of contradiction, and seeks shelter under the plea of forgetfulness, a great point of vantage will be gained. (Work of the Advocate, p. 310).

Female witnesses.

As exaggeration chiefly springs from an innate love of the marvellous, and is most remarkable in the softer sex, a prudent man will, in general, do well to weigh with some caution the testimony of *female witnesses*. This is the more necessary, in consequence of the extensive and dangerous field of falsehood opened up by mere exaggeration ; for, as truth is made the ground work of the picture, and fiction lends but light and shade, to detect the lurking falsehood often requires much patience and acuteness. In short, the intermixture of truth disarms the suspicion of the candid, and sanctions the ready belief of the malevolent. If due allowance be made for this feminine weakness of a proneness to exaggerate, the testimoney of women is at least deserving of equal credit to that of men. Indeed, in some respects they are superior witnesses ; for first, they are, in general, closer observers than men ; next, their memories, being less loaded with matters of business, are usually more

tenacious ; and lastly, they often possess unrivalled powers of simple and unaffected, if rather lengthy, narration. Tay. s. 54). Female witnesses are apt to be more emotional and loquacious. They generally indulge in long narratives and it takes some time to bring them to the point. But too frequent interruption is likely to embarass and confuse them. In India female witnesses generally present peculiar difficulties, on account of their habits of seclusion and observance of strict *purda*. Considerable allowance should be made in their case, and the judge and the lawyer must first make sure that they have understood the questions thoroughly. As they do not appear before the public, their sense of shame and embarassment stand in the way of giving clear answers.

In no cases it is more difficult to arrive at a confident verdict as to whether evidence is false or true than in cases in which women allege that they have been outraged. There is possibility of unintentional misstatements produced by hysterical conditions (*Saadullah* v. *E.*, 81 I.C. 629). In the case of rape of an innocent girl of tender age, her evidence is of great value, specially when she makes a statement immediately after the occasion (*Soosalal* v. *E.*, 82 I.C. 142).

Child witnesses.

Sir William Blackstone apparently thought, that less credit was due to the testimony of a *child* than to that of an adult ; but reason and experience scarcely warrant this opinion. In childhood, observation and memory are usually more active than in after-life, while the motives for falsehood are less numerous and powerful. The inexperience and artlessness, accompanying tender years

usually render a child incapable of sustaining consistent perjury, while they operate powerfully in preventing his true testimony from being shaken. A child comprehending the drift of the questions put in cross-examination has no course but to answer them according to the fact. Thus, if he speak falsely, he is almost inevitably detected ; but if he be the witness of truth, he avoids even that suspicion of dishonesty, which sometimes attaches to older witnesses, who, though substantially telling the truth, throw discredit on their testimony, by a too anxious desire to reconcile many apparent inconsistency. (Tay. s. 65). Children can be easily tutored or threatened, and so in spite of the fact that they possess unsophisticated minds and have hardly any motive to deceive, their evidence should be received with caution. But they are not very difficult to handle with, as witnesses of tender age break down very soon in cross-examination, when lying. The great danger in regard to child witnesses is that on account of their tender age and immature faculty, it is impossible to expect any very precise narrative of what they actually witnessed and when leading questions are put into their mouth in cross-examination they are liable to give affirmative answers without understanding exactly what were they being questioned about. For a case in which a young man was convicted of rape on a young girl which resulted in her death and in which the principal witness was a girl of about 9 or 10 years, see *Sambhu* v. *K. E.*, 3 Pat. 410.

Police Witnesses.

The testimony against a prisoner of *policemen, constables,* and others employed in the suppression and

detection of crime, should usually be watched with care ; not because they intentionally pervert the truth, but because their professional zeal, fed as it is by an habitual intercourse with the vicious, almost necessarily leads them to ascribe all actions to the worst motives, and to give a colouring of guilt to facts and conversations which, in themselves are consistent with perfect rectitude. The creed of the Police is naturally apt to be that "all men are guilty, till they are proved to be innocent." (Tay. s. 57). The caution is all the more necessary in India, where the police are more corrupt than in other countries. In the first Report of the Indian Law Commissioners it was stated that "the evidence taken by the Parliamentary Committee on Indian Affairs during the Sessions in 1852 and 1853, and other papers which have been brought to our notice, abundantly show that the powers of the police are often abused for purposes of extortion and oppression." Things have not much improved since then and the conduct of the police has been the subject of strong comment in various dicisions.

The following extracts from Harris' Hints on Advocacy, 14th Ed., will prove helpful :—

They are dangerous persons. They are *professional witnesses*, and in a sense that no other class of witnesses can be said to be so. Their answers generally may be said stereotyped. Don't imagine that you are going to trip him up upon the part where his beat has been for many a year. He will perceive you coming while you are a long way off, and in all probability go out and meet you. Perhaps before you were born he answered the question you have just put. But try him with something just as little out of the common line by way of experi-

ment. You see he looks at you as though you have got the sun in his eyes. He cannot quite see what you are about. And you must keep him with the sun in his eyes if you desire to make anything of him. Without accusing him even by implication of having no reverence for the sanctity of an oath, I must say, that if he sees the drift of your questions, the chances are against your getting the answers you want, or in the form in which you would like them. He thinks it his duty to baffle you, and if you do not get an answer you don't want, it will probably be because the policeman is as young and inexperienced as you are. To be effective with the policeman your questions must be rapidly put. Although he has a trained mind for the witness-box, it is trained in a very narrow groove ; it moves as he himself moves, slowly and ponderously along its particular beat, it travels slowly because of its discipline, and is by no means able to keep pace with yours or ought not to be. You should not permit him to trace the connection between one question and another when you desire that he should not do so (pp. 104, 105).

Unless certain of the answer, never under any circumstances, ask a policeman as to character. The highest character he can give a respectable person will be that he "does not know anything against him." Furthermore, it is dangerous to put "fishing" questions to this class of witness (p. 106).

The police constable is not below human nature generally. The parent of many of his faults is the fact that subordinate judges as a rule, think he must be protected by *an implicit belief* in his veracity. As a

natural consequence he falls into the error of believing in his own infallibility (Harris, p. 107).

Experts.

The cross-examination of experts, specially professional experts is always a difficult matter. They are always partisan witnesses and come to the box with a theory of their own and a resolution to support it at all costs. They are a type of remunerated witnesses and invariably give emphatic opinions. Their opinions are previously ascertained and they are brought only when they are favourable to the party calling. At the same time, in poisoning and other cases their opinion becomes of great value and cannot be lightly dispensed with. Experts are shrewd and cunning men and when they are well up in their special subject, it is idle to expect a breakdown unless the cross-examiner takes the precaution of arming himself with considerable information upon the subject under investigation by previous study. It is unsafe to cross-examine an expert upon his theory by superficial questions. He is skilled in his own profession and will seize upon every opportunity of emphasising his views and explaining matters which if left untouched would have possibly been overlooked. The real value of expert opinion consists in drawing inferences from what the expert has *himself* observed, not from what he merely surmises or has been told by others. Care should be taken that he does not assume the function of the judge or the jury and take upon himself the task of deciding a question or giving opinion upon a matter which is for the Court or jury to determine. The questions should not be so framed as to allow the witness to form a critical review of the

testimoney of other witnesses and to draw inferences or conclusions therefrom. In a case (*R.* v. *Frances*, 4 Cox. C.C. 57). Alderson and Cheswell, JJ. refused to allow a witness to be asked whether, from all the evidence he had heard, both for the prosecution and defence, he was of opinion that the prisoner at the time he committed the act was of sound mind, and said that the proper mode is to ask what are the symptoms of insanity, or to take particular facts, and assuming them to be true, to ask whether they indicate insanity on the part of the prisoner (Wills. Cir. Ev. 6th Ed. p. 157).

The scope of hypothetical questions to experts has been debated upon in many cases and it is not easy to formulate any inflexible rule capable of application in all cases. As a rule an expert cannot be asked the very question which the judge or the jury has to decide, unless the issue is one of science and he has *himself* observed the facts In *R.* v. *M'Naghten*, 10 Cl. & F. 200, 212, Tindal, C. J.; said: "The question lastly proposed by your Lordships is 'Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and what delusion at the time?' In answer thereto, we state to your Lordships that we think the medical man, under the circumstances supposed, cannot in strictness be asked the opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which

it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the questions become substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted as a matter of right."

Phipson has summarised the law thus after reviewing numerous decisions: "The cases are conflicting as to how far an expert may be asked *the very question which the judge or the jury have to decide*; but the authorities appear to be as follows:—

(*i*) Where the issue involves other elements besides purely scientific, the expert must confine himself to the latter, and must not give his opinion upon the legal or general merits of the case.

(*ii*) Where the issue is substantially one of science or skill merely, the expert may, if he has *himself* observed the facts, be asked the very question which the jury have to decide.

(*iii*) If however, his opinion is based merely upon facts proved by others, such a question is improper, for it practically asks him to determine the truth of their testimony, as well as to give an opinion upon it; the correct course is to put such facts to him *hypothetically* and not *en bloc* asking him to assume one or more of them to be true, and to state his opinion thereon (Phip. pp. 391-392).

"As a general thing, it is unwise for the cross-examiner to attempt to cope with a specialist in his own field of enquiry. Lengthy cross-examinations along the lines of the expert's theory are equally disastrous and should rarely be attempted. Many lawyers, undertake to

cope with a medical or handwriting expert on his own ground, be it surgery, correct diagnosis, or the intricacies of penmanship. In some rare instances (more especially with poorly educated physicians) this method of cross-questioning is productive of results. More frequently, however, it only affords an opportunity for the doctor to enlarge upon the testimony he has already given, and to explain what might otherwise have been misunderstood or even entirely overlooked by the jury. Experience has led me to believe that a physician should rarely be cross-examined on his own speciality, unless the importance of the case has warranted so close a study by the counsel of the particular subject under discussion as to justify the experiment ; and then only when the lawyer's research of the medical authorities, which he should have with him in court, convinces him that he can expose the doctor's erroneous conclusions, not only to himself but to a jury who will not readily comprehend the abstract theories of physiology upon which even the medical profession itself is divided.

"On the other hand, some careful and judicious questions, seeking to bring out separate facts and separate points from the knowledge and experience of the expert, which will tend to support the theory of the attorney's own side of the case, are usually productive of good results. In other words, the art of the cross-examiner should be directed to bring out such scientific facts from the knowledge of the expert as will help his own case, and thus tend to destroy the weight of the opinion of the expert given against him.

"Another suggestion which should always be borne in mind is that no question should be put to an expert

which is in any way so broad as to give the expert an opportunity to expatiate upon his own views, and thus afford him an opportunity in his answer to give his reasons, in his own way, for his opinions, which counsel calling him as an expert might not otherwise have fully brought out in his examination" (Wellman, pp. 77-78).

"When the cross-examiner has totally failed to shake the testimony of an able and honest expert, he should be very wary of attempting to discredit him by any slurring allusions to his professional ability as in such cases there is always the danger of giving the expert a good chance for a retort." (Wellman, p. 101).

Some so called experts are mere shams or pretenders, and if the advocate has succeeded in forming a correct estimate of his character, he should at the earliest opportunity tear off his mask by suitable questions. When such a man realises that he has been found out, he will cease to give airs and try to make a hasty retreat without exposing himself to further discomfiture.

Lawyers going to cross-examine a professional expert must prepare himself with a thorough study of the subject. Distinguished advocates have shown remarkable skill and acumen when cross-examining experts on highly scientific or technical subjects. "Benjamin F. Butler was once known to have spent days in examining all parts of a steam engine, and even learning to drive one himself, in order to cross-examine some witnesses in an important case in which he had been retained. At another time Butler spent a week in the repair shop of a railroad, part of the time with coat off and hammer in hand ascertaining the capabilities of iron to resist pressure—a point on which his case turned." (Wellman, p. 192). In the celebrated

Crippen trial which was a case of hyoscin poisoning, the remains of the murdered woman which had been horribly mutiliated were found beneath the floor as a "mass of flesh" several days after the crime. The medical evidence was most sensational and "eight eminent doctors and surgeons wrangled with counsel over hardly recognisable pieces of flesh, which were handed about the Court in a soup plate ; and discussed the process of putification and the possibility of alkaloids, found in the body, being due to that process and not to hyoscin." The properties of hyoscin were then known to very few men. It is a deadly poison and even so small a dose as one-fortieth of a grain has been known to produce severe symptoms. In Palmer's case, the question was whether Cook died of traumatic tetanus or from tetanus produced by strychnine poisoning. Sir Alexander Cockburn who led for the Crown was faced with a most difficult task and exhibited a wonderful knowledge of the properties of strychnine. The difficulty was enhanced by the fact that no trace of strychnine was revealed by the post mortem examination. It was a case of "Who shall decide when doctors disagree," Sir Alexander Cockburn's theory was that strychnia was administered in an almost imperceptible dose and his presentation of the scientific facts and cross-examination of medical witness for the defence was a performance rarely met.

CHAPTER XIX.

SOME IMPORTANT RULES OF EVIDENCE.

A thorough acquaintance with the fundamentals of the law of Evidence is an indispensable equipment of a good advocate. Questions of relevancy or admissibility, are often questions of great nicety. They crop up suddenly in the midst of a trial and have to be discussed and decided then and there. In order that an advocate may justify his objections to the questions of his adversary or meet his adversary's objections to his own questions, he must be very familiar with the rules and principles of evidence. If it is a point of law or fact, he may come prepared ; but when a question of admissibility suddenly springs up, he has to throw himself on the resources of the moment and give an immediate reply, one way or the other, supported by authority.

Cox says: "If you watch closely the examination of witnesses, in a trial where an experienced advocate is on the one side and an inexperienced one on the other, you will see the practised man putting question after question, and eliciting facts most damaging to the other side, which his adversary might have shut out by a prompt objection to them, but which he permits to pass without protest, because he is not sufficiently practised in the law of evidence to discern their illegality on the instant, or so much master of it as to give a reason for objection, even though he may have a sort of dim sense that the questions are wrong somehow, and he protests against leading questions, while he permits illegal questions

destructive to his client to be put without a murmur. On the other hand, when it comes his turn to examine his witnesses, and on the experienced man devolves the duty of watching, you will see how, in no single instance, is he suffered to tread over the traces ; but the strictest rules of evidence are enforced upon him, so that he sits down, leaving half his case undeveloped, while his adversary has brought out all he desired to elicit."

A knowledge of the rules and principles of Evidence is in constant requisition, and the advocate should, therefore, have a through mastery of them. Some of the most important rules of evidence are collected below for helping the memory and for ready reference. They are succintly stated and will be found to be of use only after a careful study of the law of Evidence.

1. Oral evidence.

Oral evidence must in all cases be direct (s. 60 I.E.A.) A witness must state only *facts* within his knowledge or recollection. His opinions or beliefs are inadmissible.

Exceptions.—

In matters of science, or skill or art or foreign law, the opinions of experts are admissible *e.g.*, handwriting, finger impression, medical evidence &c. (s. 45). Grounds of the opinion of an expert are also relevant (s. 51).

In matters of handwriting, the opinion of a person who is not an expert is also admissible (s. 47). *e.g.*, a person who is acquainted with the handwriting in question.

In questions of relationship between two or more parties, the opinion of *any* person having special

means of knowledge as expressed by conduct is admissible (s. 50). As to relevancy of opinions regarding usages, tenets, &c. see s. 49.

2. Hearsay.

Hearsay is no evidence and is not generally admissible. The ordinary idea of hearsay is the statement of a witness before the Court, that is said to have been heard from a third party (non-witness). Hearsay includes writings as well as verbal statements.

Exceptions.—

(1) Admissions ; Confessions ; Statements which are part of the *res gestae ;* Statements made in the presence and hearing of a party.

(*a*) Statements made out of Court (admissions) by a party to the proceedings, or a person connected with him in any of the ways mentioned in ss. 18 to 20 I.E.A. (representative, person from whom interest derived &c.) are admissible *against but not in favour of such party* in proof of the truth of the facts stated. Similarly, confessions out of Court if voluntarily made, are admissible.

N. B.—An admission may, however, be proved *in favour* of the maker thereof to show the existence of any state of mind or body relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable. [s. 21 (2) ; see also s. 14].

(*b*) Statements accompanying an incident, made so shortly before or after it as to form part of the same transaction are admissible as part of the *res gestae* or main fact [s. 6 and *illus.* (*a*)]. The declaration must be *substantially contemporaneous* with the fact *i.e.*, made either during, or immediately before or after, its occurrence ; but not at such an interval as to give an opportunity to devise anything to serve a purpose (*Thomson* v. *Trevanion*, 1693, Skin. 402 ; *R.* v. *Christie*, 1914, A.C. 545).

(*c*) When the conduct of any party is relevant, statements made to him in his presence or hearing which affects such conduct are admissible [s. 8 and *illus.* (*g*)]. Thus, if a man accused of a crime does not give any reply or gives a false or evasive reply, his conduct coupled with the statements is evidence against him.

(2) Statements (written or verbal) made by persons dead, or who cannot be found or whose attendance cannot be procured. They may be :—

(*a*) Dying declarations or statements by a person as to the cause of his death.

(*b*) Statements made in course of business, discharge of duty &c.

(*c*) Declarations against interest.

(*d*) Statements giving opinion as to public right or custom, or matters of general interest.

(*e*) Statements relating to existence of relationship (between persons living or dead) by person who had special means of knowledge.

(*f*) Statements relating to existence of relationship between deceased persons, made in any will, pedigree, &c.

(*g*) Statements contained in a deed, will etc., relating to any transaction by which any right or custom was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence.

(*h*) Statements made by several persons and expressing feelings relevant to the matters in question (s. 32).

(3) Statements in public documents *e.g.*, Acts, Gazettes, Public Records &c., &c.

3. Leading questions.

Leading questions may not be asked in examination-in-chief or re-examination except with the leave of the Court (s. 142, *ante* p. 391). They may be asked in cross-examination (s. 143, *ante* p. 399).

Exceptions.—

The Court may permit a party to lead his own witness, in other words to cross-examine him, if he turns adverse (s. 154).

4. Discrediting one's own witness.

Ordinarily a party is not allowed to discredit his own witness, but if he turns adverse, he may with the premission of the Court impeach, his credit in the ways stated in s. 155 (*see ante* Ch. XVI).

5. Cross-examination to credit.

The credibility of a witness under cross-examination

may be impeached by asking questions tending to—(i) test his veracity ; (ii) discover his position in life ; or (iii) to shake his credit by injuring his character, although the answers might tend directly or indirectly to criminate him (s. 146, *ante* p. 422).

When the question is *relevant only in so far as it tends to shake the credit* of the witness, the cross-examiner is bound by the answer and the witness cannot be contradicted by any evidence. Contradiction is allowed in two cases only viz., (i) when the witness denies previous conviction ; (ii) denies the suggestions in a question tending to impeach his impartiality (s. 153, *ante* p. 422, 423).

The credit of a witness may also be impeached by giving *independent evidence* in the following ways: (i) by evidence of persons who believe him to be unworthy of credit ; (ii) by proof of bribery or offer of bribe ; (iii) by proof of former inconsistent statements ; (iv) in a case of rape it may be shown that the prosecutrix was generally of immoral character (s. 155, *ante* p. 425).

6. Contradiction by previous statement.

A witness may be cross-examined as to his previous *statements in writing relevant* to the matter in question with a view to contradict him ; but his attention must first be called to these parts of the writing which are to be used for purpose of contradiction (s. 145, *ante* p. 414). A witness cannot be contradicted on irrelevant matter or matters collateral to the issue.

The credit of a witness may also be impeached by proof of former inconsistent statements, verbal or written (s. 155, *ante* p. 415).

7. Proof of Documents.

Contents of a document may be proved by primary or secondary evidence (s. 61). As to what is secondary evidence, see 63 I. E. A. The contents of a document must be proved by primary evidence *i.e.*, the document itself and not by oral evidence (s. 64). The rule applies to both examination-in-chief and cross-examination.

Exceptions.—

Secondary evidence may be given in the following cases:—

(*a*) When the original is in the possession of the adverse party, or a party not subject to the process of the Court, or a person legally bound to produce it and he fails to produce it after notice. Notice is not necessary in certain cases (see provisos 1 to 6 of s. 66).

(*b*) When the existence, condition or contents of the original are admitted *in writing* by the party against whom it is proved.

(*c*) When the original is lost or destroyed. But the loss or destruction must first be proved.

(*d*) When the production of the original is physically impossible or highly inconvenient.

(*e*) When the original is a public document. In this case only certified copy is admissible as secondary evidence.

(*f*) When the original is one of which a certified copy is permitted by the I. E. A. or by any other law.

(*g*) When the original consists of numerous accounts or other documents which cannot be conveniently examined in Court, the general result of the documents may be given (s. 65).

8. Oral evidence of written contracts.

When the terms of a contract, grant etc., are reduced to writing and in all cases in which any matter is required by law to be reduced to writing, no evidence shall be given *in proof of the terms* of the contract &c., except the document itself, or secondary evidence (see rule 7 *ante*) when such evidence is admissible under the law (s. 91).

Oral evidence is not only inadmissible in proof of the terms of the document, but also for the purpose of *contradicting, varying, adding to, or substracting from its terms* (s. 92). S. 91 deals with the *exclusiveness* of documentary evidence *i.e.*, the document is the exclusive evidence of its terms. Sec. 92 deals with the *conclusiveness* of documentary evidence *i.e.*, the document contains a full and final statement of the intention of the parties and its terms cannot be varied by oral evidence.

Exceptions to s. 91.—

(*i*) When a public officer has acted as such, the writing of appointment need not be proved. It is presumed that he has been duly appointed.

(*ii*) Wills admitted to probate, may be proved by the probate copy, although it is technically secondary evidence.

(*iii*) When a document is intended to operate only as a *collateral* or *informal memorandum* of a transaction and not as a contract or other binding legal agreement, oral evidence may be given [see *illus.* (*d*) and

(*e*) of s. 91]. Thus payment of money may be proved by oral testimony, although a receipt has been given for the same (*Venkayyar* v. *Venkatabayya,* 3 Mad. 53 ; *Girish* v. *Sashi Sekhareswar,* 27 Cal. 951 P.C.).

(*iv*) Public documents, Registers &c. Thus, an entry of marriage, birth, or death in a public register does not exclude independent proof of the fact.

(*v*) The *existence of a fact* is quite different from the terms of a contract embodied in a document and the former may be proved by independent oral testimony. Thus, the *fact* of a partition may be proved by oral evidence, but not its *terms* (*Chhotalal* v. *Mahakore,* 41 Bom. 466 ; *Narasingh* v. *Uttam,* 1923 A.I.R. Lah. 393). Oral evidence may be given to show that a contract, as a matter of fact was reduced to writing, but not the terms (*Ram Bahadur* v. *Dusuri,* 17 C.L.J. 399).

Exceptions to s. 92.—

(*i*) Oral evidence may be given to prove that a document is invalid by reason of fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

(*ii*) Oral evidence may be given of matters on which a document is silent and which are not inconsistent with its terms. The rule applies when the document does not contain the *whole of the terms.*

(*iii*) Evidence may be given of a separate oral agreement that no obligation should be attached to the written contract until a *condition precedent* has been fulfilled.

(*iv*) (*a*) Where a transaction has been reduced to writing not because the law requires it to be so, but by *agreement* for the sake of convenience, evidence may be given of any subsequent oral agreement modifying or rescinding it altogether.

(*b*) Where a matter has been reduced to writing according to the requirements of law, it cannot be modified or rescinded, except by another written document.

(*c*) When the contract in writing is *registered* whether or not registration is compulsory, oral evidence cannot be given of an agreement to modify or rescind it. It must be superseded or varied by a similar registered document.

(*v*) Oral evidence may be given in proof of usage or custom affecting incidents usually annexed to contracts to explain or supply terms in commercial transactions viz., bills of exchange, insurance policies &c., provided that they do not contradict the terms of the contract.

(*vi*) Any fact may be proved which shows in what manner the language of a document is related to existing facts. Evidence of such surrounding circumstances may be given only for the purpose of ascertaining and giving effect to the full intention of the parties as expressed in the document (*Narasingerji* v. *Panuganti*, 47 Mad. 729 P.C.). Oral evidence of intention is inadmissible under s. 92 (*Balkishen* v. *Legge*, 22 All. 149 P.C.).

Oral evidence may be given to explain latent ambiguities in a document (ss. 95, 96, 97).

9. Proof of attested documents.

A document required by law to be attested *e.g.*, a mortgage or a gift, must be proved by calling one attesting witness at least:

Provided that it shall not be necessary to call an attesting witness, unless its execution by the person by whom it purports to have been executed is specifically denied (s. 68).

['Attested' is now defined in s. 3 of the T. P. Act and includes attestation on acknowledgment of signature of executant and overrides the meaning given to it in *Shamu Pattar* v. *Abdul Kader*, 16 C.W.N. 1009 P.C.]

If no attesting witness is alive or found, two things must be proved: (*i*) the signature of one attesting witness and (*ii*) the signature of the executant (s. 69).

The admission of execution of an attested document is sufficient proof of execution, but not of attestation (s. 70; *Hira Bibi* v. *Ramhari Lal*, 42 C.L.J. 148 P.C.).

If the attesting witness denies or does not recollect execution, it may be proved by other evidence (s. 71). Other oral evidence is admissible to show that the attestor did as a matter of fact see the execution (*Sashimukhi* v. *Monmohini*, 67 I.C. 87; *Lakshman* v. *Gokul*, 1 Pat. 154).

An attested document not required by law to be attested may be proved as if it was not attested (s. 72) *i.e.*, by proof of signature and handwriting of person alleged to have signed or written (s. 67).

10. Ancient documents.

When a document thirty years old is produced from proper custody, it proves itself. The court *may* presume that it has been signed, executed or attested by the persons

purporting to do the acts (s. 90). But when a thirty years old document purports to have been executed by a person on behalf of another, there is no presumption as to the *authority* of the executant to sign on his behalf. The authority must be proved (*Abilak* v. *Dallial*, 3 Cal. 557 ; *Tarakeshwar* v. *Srish*, 27 C.W.N. 964 ; *Ramanikanta* v. *Bhimnandan*, 50 Cal. 526. *Contra*: *Sheikh Bodha* v. *Sukhram*, 47 A 31 F.B.).

11. Entries in books of account etc.

Entries in books of account regularly kept in the course of business are relevant, but they shall not alone be sufficient to charge any person with liability (s. 34).

[Entries in books of account, *e.g.*, *talabbaki*, *jama-washibaki* papers &c., are not evidence *per se*. They are not independent evidence but only *corroborative* evidence and a person cannot get a decree by merely proving the existence of the entries. He must further prove the facts by independent evidence, (*Mahomed Mahmud* v. *Safar Ali*, 11 Cal. 407; *Atkowli* v. *Taraknath*, 17 C.W.N. 774; *Umed Ali* v. *Habibullah*, 47 Cal. 266; *Ramparara* v. *Balaji*, 28 Bom. 294; *Faizuddin* v. *Agnikumar*, 71 I.C. 300). They may however be admissible as independent evidence, if relevant under s. 32 (2) *i.e.*, when the person making the entries is dead (*Rampayara* v. *Balaji*, 28 Bom. 294; *Charittar* v. *Kailash*, 44 I.C. 422)].

12. Documents without prejudice.

Where there is a dispute or negotiation between the parties, no evidence can be given of what has been said or written between them expressly or impliedly *"without prejudice"*.

Exceptions.—

When the offers of compromise "without prejudice" have been accepted and have terminated in a

concluded contract, evidence may be given. (*Re River Steamer Co.*, L.R. 6 Ch. 822. *Cf.* Or. XXIII, r. 3 C. P. Code).

When the writing is of such a nature that it may prejudice a person addressed and he chooses not to treat it as "without prejudice," *i.e.*, a letter addressed to a creditor which is of itself at act of bankruptcy. (*Re Daintrey*: *Ex parte Holt*, 1893, 2 Q.B. 116).

13. Confession in criminal cases.

A confession, in order that it may be admissible must be perfectly voluntary. It is inadmissible if it appears to the Court to have been caused by inducement, threat, or promise having reference to the charge against the accused (s. 24). [The burden of proving the voluntary nature of the confession is on the prosecution. (*R.* v. *Warringham*, 1851, 2 Den. C.C. 447 ; *R.* v. *Thompson*, 1893, 2 Q.B. 12 ; *Ashutosh* v. *E.*, 26 C.W.N. 54 ; *E.* v. *Panchkari*, 29 C.W.N. 300)].

When more than one person are being *jointly tried* for the same offence, a confession by one of them *may be taken* into consideration against the others (s. 30). [The better opinion is that such confession is not technically 'evidence' against the others but is an element which may be taken into consideration *i.e.*, it can lend assurance to other facts. (*Barindra* v. *E.*, 37 Cal. 467 ; *Q.* v. *Chandra*, 24 W.R. Cr. 42 ; *Q. E.* v. *Nirmal*, 22 All. 445 ; *Q. E.* v. *Khandia*, 15 Bom. 66).] Confession of a co-accused is however evidence of the weakest kind, and as a sound rule of practice it is not sufficient to warrant a conviction if uncorroborated by independent evidence.

Confession made to a police officer (s. 25) or made while in police custody is not admissible (s. 26). Provided that when any fact is discovered on account of some information received from an accused in police custody, so much of the information, whether it amounts to confession or not, as relates distinctly to the fact discovered, may be proved (s. 27). S. 27 qualifies not only ss. 25, 26 but also s. 25 (*Amiruddin* v. *E.*, 45 Cal. 557). [When an accused stated to a police officer that his wife was lying wounded with a sword on the bed and he had severely hacked her, and the dead body with the sword was found —the first statement is admissible but not the second (*Legal Remem.* v. *Lalit*, 49 Cal. 167)].

14. Accomplice evidence.

An accomplice is a competent witness against an accused, and though a conviction on accomplice evidence only is not illegal (s. 133), it is a rule of practice which has acquired the force of law that an accomplice must be corroborated on material particulars. Sec. 114 *illus.* (*b*) says that "an accomplice is unworthy of credit, unless he is corroborated in material particulars". It is now settled law that there must be corroboration as to—(*i*) commission and circumstances of the crime ; (ii) identity of each one of the accused ; (iii) actual participation in the crime ; (iv) where there are several persons, the corroboration must be not only as to one, but as to all of the persons affected by the evidence ; (v) evidence necessary for corroboration must proceed from an independent and reliable source ; (vi) evidence of one accomplice is not sufficient corroboration of another.

15. Character evidence.

In civil cases the character of a party concerned, to prove conduct imputed is irrelevant except in so far as such character is otherwise relevant (s. 52). A witness cannot be asked his opinion about the character of a party. When a person's character is of the substance in issue, evidence may be given of his general character whether in civil or criminal cases. In suits for damages, though character may not be directly in issue, evidence of character of a person so as to affect the amount of damages is admissible (s. 55 and s. 12) *e.g.*, in actions for defamation, breach of promise, seduction &c.

In criminal cases the fact that accused is of good character is always relevant and admissible in his favour (s. 53). But the fact of the bad character of an accused is always irrelevant and the prosecution cannot in *the first instance* tender evidence of bad character. It is admissible only in reply *i.e.*, when the accused has first given evidence of good character—either by independent evidence or by cross-examination of prosecution witnesses (s. 54). Sec. 54 does not apply to cases in which the bad character of any person is itself a fact in issue.

Character in ss. 52, 53, 54, 55 includes both *reputation and disposition* and evidence may be given only of *general* reputation or general disposition, and not of particular acts by which reputation or disposition were shown (s. 55 *Expln.*).

16. Previous Conviction.

A witness cannot be asked any question as to whether the accused was previously convicted of any offence other than the offence with which he is charged. The accused

may be seriously prejudiced by the admission of such evidence. The proper object of previous conviction is to determine the amount of punishment should there be any conviction (*Roshan* v. *Q. E.*, 5 Cal. 768) and records of previous conviction should not be put in until the close of the trial (*Q.* v. *Shiboo*, 3 W.R. Cr. 38). The principle underlying the provisions of s. 310 Cr. P. Code that the knowledge of previous conviction should be excluded from the judge and jury when weighing the evidence is also to be found in s. 54 I. E. A. (*Maung E. Gyi* v. *E.*, 81 I.C. 106). As to how previous conviction is to be proved, see s. 511 Cr. P. Code.

Exceptions.—

When the accused gives evidence of good character, previous conviction becomes relevant in reply as evidence of bad character (s. 54). When the previous commission by the accused of an offence becomes relevant, the previous conviction is also relevant [s. 14, Expln. 2, *illus.* (*b*)]. Previous conviction is relevant when it is necessary to prove motive for the fact in issue [s. 8 and *illus.* (*f*) to s. 43], guilty knowledge or intention (*E.* v. *Alloomiya*, 28 Bom. 129), design or system (*e.g.*, offences under ss. 400, 401 I. P. Code, *E.* v. *Nabakumar*, 1 C.W.N. 146 ; *Bonai* v. *E.*, 38 Cal. 408 ; *E.* v. *Tukaram*, 15 I.C. 811) &c., &c. Previous conviction is relevant under s. 43 I. E. A. [see *illus.* (*e*)].

Evidence of previous conviction may be given when accused is liable to enhanced punishment (see ss. 221, 310, 311 Cr. P. Code ; s. 75 I. P. Code ; s. 3, 4 Whipping Act).

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